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NO. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

TEXACO REFINING AND MARKETING INC.
and
TEXACO MARINE SERVICES INC.,
Petitioners,

v.

THE ESTATE OF DAU VAN TRAN,
VI THI PHAM and DO VAN TRAN,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NINTH DISTRICT COURT OF APPEALS OF THE STATE OF TEXAS AT BEAUMONT, TEXAS

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QUESTIONS PRESENTED FOR REVIEW

1. When an action for wrongful death arising out of a maritime tort in territorial waters is brought in state court, may the state court apply the substantive law of the state and award damages permitted by state law or does federal general maritime law pre-empt state law?

2. May a state court hold that a death caused by the negligent operation of an oceangoing vessel on navigable waters is not a maritime tort that would require application of federal maritime law?

CERTIFICATE OF INTERESTED PARTIES AND PARTIES BELOW

The following were parties in the proceedings below in addition to those parties identified in the caption hereof:

Farmer Boy's Catfish Kitchens International, Inc.
Theresa Nguyen
Anh Nguyen

The parent of Petitioner Texaco Refining & Marketing Inc. is:

TRMI Holdings Inc. which is owned by
Texaco Inc.

The parent of Petitioner Texaco Marine Services Inc. is:

Texaco Overseas Holdings Inc. which is owned by
TRMI Holdings Inc. which is owned by
Texaco Inc.

The following is a list of the subsidiaries and/or affiliates of Texaco Inc. which have publicly-held debt or equity securities:

Texaco Capital Inc.
Texaco Capital N.V.
Texaco International Finance Corp.
Texaco Inc.
Texaco Mexicana S.A. de C.V.
Texaco Togo
Texaco Nigeria Limited
Texaco Ghana Limited
Refineria Texaco de Honduras S.A.

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OPINION SOUGHT TO BE REVIEWED

The opinion of the Texas Court of Appeals that Texaco seeks to have reviewed was reported as *Texaco Refining & Marketing, Inc. v. Estate of Tran*, 777 S.W.2d 783 (Tex. Ct. App.—Beaumont, 1989). It is reproduced as Appendix A to this petition.

STATEMENT OF JURISDICTION

Petitioners seek review of an opinion of the Ninth District Court of Appeals for the State of Texas at Beaumont, Texas. That opinion, (App. A at 2a), was issued on August 31, 1989. A judgment on the opinion was also entered that day. (Appendix A at 1a).

The appellate court denied Texaco's motion for rehearing on September 27, 1989. (Appendix E at 34a). Texaco then petitioned the Texas Supreme Court for a discretionary writ of error. The Texas Supreme Court denied that petition without comment on January 3, 1990. (Appendix B at 19a). Texaco then sought rehearing of the Texas Supreme Court's denial of the writ of error petition, and that motion for rehearing was denied on February 7, 1990. (Appendix F at 35a).

This petition is therefore timely under this Court's Rules 13.1 and 13.3 because the petition is filed within 90 days of the Texas Supreme Court's final denial of relief to Texaco.

This Court has jurisdiction to consider this petition under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

46 U.S.C. § 740

The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water:

* * *

46 U.S.C. § 767

The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone.

U.S. Const. art. I, § 8, cl. 18

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution of the Government of the United States, or in any Department or Officer thereof.

U.S. Const. art. III, § 2, cl. 1

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controveries between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

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PETITION FOR A WRIT OF CERTIORARI TO THE NINTH DISTRICT COURT OF APPEALS OF THE STATE OF TEXAS AT BEAUMONT, TEXAS

STATEMENT OF THE CASE

Dau Van Tran died on September 16, 1985, as a result of an accident on the Sabine River at Port Arthur, Texas. Tran was climbing out of the water at dockside, apparently after trying to remove an obstruction from a shrimpboat's propeller, when a wave allegedly generated by a large ship sailing down-river pushed the shrimpboat against the dock. Tran was crushed between the boat and the dock.

Tran's Estate and his mother and father filed suit in Texas state court against the petitioning Texaco entities (hereinafter collectively Texaco), which owned and operated the ocean-going tanker TEXACO CALIFORNIA that allegedly caused the wave, and against the owner of the dock. The complaint (Appendix G) invoked the Texas wrongful death and survival statutes and the federal general maritime law, (App. G at 39a), but did not specify which body of law allegedly applied to which defendant.

After a bench trial, the judge entered findings of fact and conclusions of law (Appendix C) that exonerated the other defendants but found Texaco liable for negligently operating the vessel. The court awarded damages of $1,324,849.55, (App. C at 29a), of which $575,000 was specifically denominated as compensation for the parents' mental anguish. (App. C at 27a). The court adjusted the award for Tran's 15% negligence and for a settlement plaintiffs received from the shrimpboat owner, (App. C at 29a), then entered final judgment dated September 28, 1988, (Appendix D), for $1,103,622.12, plus prejudgment interest. (App. D at 32a).

Texaco moved to reform that judgment. (Appendix H). In a supporting memorandum, (Appendix I), Texaco argued that although state law may have applied to the plaintiffs' claims against the dock-owner, the federal general maritime law governed the claims against Texaco and pre-empted state law. (App. I at 49a-51a; 52a-57a). The choice of law determination was significant, because federal general maritime law does not permit recovery of damages for mental anguish, *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 586 & n. 17, 94 S.Ct. 806, 815 & n. 17, 39 L.Ed.2d 9 (1974), and may not permit recovery of prejudgment interest. *Cf. Martin v. Walk, Haydel & Associates, Inc.*, 794 F.2d 209 (5th Cir. 1986). Texaco asked that the judgment be amended to conform to general maritime law, which would require, at a minimum, striking the sums awarded to Tran's parents as mental-anguish damages. (App. I at 51a-52a). The trial court failed to act on Texaco's motion, thereby denying the motion by operation of Texas law on December 12, 1988, 75 days after the original judgment was entered. Rule 329b(c), *Tex. R. Civ. P.*

Texaco appealed to the Ninth District Court of Appeals of Texas at Beaumont. The appellate court affirmed the trial court's judgment, (App. A, 777 S.W.2d 783), and held that regardless of whether the incident was a maritime tort, a Texas court could still apply the state wrongful-death act because the death occurred in territorial waters. (App. A at 17a, 777 S.W.2d at 790). The opinion also held that because Tran died at dockside, the case was not a maritime tort, and thus was not governed by the general maritime law. *Id.* Texaco appealed to the Texas Supreme Court on the same grounds, but that court did not grant discretionary review.

Texaco asks this Court to review the Texas state court's decision to apply Texas state law and award damages thereunder. As Texaco will show, the Texas state court should have applied general maritime law, because both policy and precedent require a holding that general maritime law pre-empts state law where maritime torts are involved. As Texaco will also show, the Texas court erred in holding that this case did not involve a maritime tort, because controlling federal law holds that negligent operation of a vessel on navigable waters is a maritime tort as a matter of law. Either or both of those alternative holdings impermissibly invaded an exclusively federal domain. Texaco asks this Court to vacate the judgment and remand the matter to the Texas state courts with orders to apply the federal general maritime law to the facts as found at trial, and to modify the judgment accordingly.

REASONS FOR GRANTING THE WRIT

In *Moragne v. States Marine Lines, Ltd.*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970), this Court judicially created a federal cause of action under the general maritime law for wrongful deaths occurring in state territorial waters. Prior to *Moragne*, the general maritime law did not provide any right of action for wrongful death, although when a death occurred in territorial waters, claimants could recover under the law of the adjacent state. The question presented in this case is whether, after *Moragne*, a claimant suing in state court for a death occurring in territorial waters may recover only under the federal cause of action created in *Moragne*, or whether the plaintiff may recover under a state wrongful death statute.

Several federal appellate courts have held that after *Moragne*, federal rather than state law controls wrongful-death actions in territorial waters. *Nelson v. United States*, 639 F.2d 469 (9th Cir. 1980) ("The need for uniformity in maritime wrongful death actions requires extension of *Moragne* . . . to the exclusion of state wrongful death statutes"); *Matter of S/S HELENA*, 529 F.2d 744 (5th Cir. 1976) ("Because a persuasive rationale for the enforcement of state wrongful death statutes in admiralty courts no longer exists after *Moragne*, we hold that the wrongful death remedy provided by that case precludes recognition in admiralty of state statutes"); *Petition of United States Steel Corp.*, 436 F.2d 1256, 1279 (6th Cir. 1970) (*Moragne* changes rule that wrongful-death damages can be governed by state law, since creation of a federal wrongful-death remedy eliminates need for applying state law), *cert. denied*, 402 U.S. 987, 91 S.Ct. 1649; *reh'g denied* 403 U.S. 924, 403 U.S. 940, 91 S.Ct. 2247 (1971). *See also Lyon v. Ranger III*, 858 F.2d 22, 27 (1st Cir. 1988) (after *Moragne*, state law may serve the limited purpose of providing guidance to a federal court resolving an unsettled issue of maritime law).

When federal general maritime law applies, state law may not serve even the limited purpose of providing supplemental damages. This Court has squarely held that allowing state-law damages in addition to maritime-law damages impermissibly undermines the necessary uniformity of maritime law no matter whether the maritime measure of damages is established by Congress or by the judiciary. *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 233, 106 S.Ct. 2485, 2500, 91 L.Ed.2d 174 (1986) (state-law remedies may not supplement remedies under

maritime wrongful-death statute); *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372, 382, 38 S.Ct. 501, 503, 62 L.Ed. 1171 (1917) ("[N]o state has power to abolish the well-recognized maritime rule concerning measure of recovery and substitute therefor the full indemnity rule of the common law"); *see also Petition of United States Steel Corp.*, 436 F.2d 1256 (6th Cir. 1970) (damages in excess of those allowed under maritime law cannot be recovered under state law).

The Texas appellate court's alternative holding that Tran's death did not involve a maritime tort is patently incorrect. The trial court found that the producing cause of Tran's death was the negligent operation of the TEXACO CALIFORNIA on the Sabine River, a navigable waterway. Negligent operation of a vessel on navigable waters is a maritime tort as a matter of law. *See, e.g.*, Admiralty Extension Act of 1948, 46 U.S.C. § 740 ("The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land"); *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674, 102 S.Ct. 2654, 2658, 73 L.Ed.2d 300 (1982) (construing negligent operation of vessel on navigable waters to be a maritime tort as a matter of law even though the vessel was not engaged in commercial activity); *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 269-70, 93 S.Ct. 493, 505, 34 L.Ed.2d 454 (1972) (admiralty law regulates movement of vessels on navigable waters).

In making the foregoing errors, the state courts effectively ignored the federal interest in the development and uniform application of maritime law. The danger this precedent poses to the federal interest is heightened by the fact that Texas has recently opened its doors to the world's plaintiffs by holding that the doctrine of *forum non conveniens* is not part of Texas law. Thus, the state's courts can and must hear any case where the defendant is subject to personal jurisdiction, whether or not the case arose in Texas or had anything to do with Texas. *Alfaro v. Dow Chemical,* 33 Tex. S. Ct. J. 326 (March 28, 1990). If Texas is allowed to develop its own body of maritime wrongful-death law and apply that body of law as its courts deem proper, the Texas maritime law may grow to the point that it seriously threatens the primacy of federal maritime law.

The Texas appellate decision in the case at bar directly conflicts with the decisions of four Circuit Courts of Appeals. Moreover, the decision involves an important issue of federal law which has not been decided in a case such as this, where the plaintiff files the action in state court. The Texas decision conflicts with principles enunciated in numerous decisions of this Court. For those reasons, as set out in Rule 10.1(b) and (c) of this Court's Rules, and as set forth in more detail herein, this petition should be granted.

ARGUMENT

A. The Texas Court Erred In Holding That State Substantive Law Could Apply To A Death Occurring In Territorial Waters Caused By a Maritime Tort.

To understand why the appellate court's application of Texas law was error, we must examine the labored development of a remedy for a death occurring in state territorial waters.

1) State law was applied to maritime wrongful deaths only after this Court determined that federal law did not address wrongful death.

In *The Harrisburg*, 119 U.S. 199, 7 S.Ct. 140, 30 L.Ed. 358 (1886), this Court held that an action for wrongful death was purely statutory, and that because no federal statute addressed maritime wrongful death, the federal general maritime law did not provide a wrongful-death remedy. This holding meant that one who was injured in a maritime casualty could recover, but one who died had no remedy.

Both this Court and Congress acted to alleviate the harshness of that result. In *The Hamilton*, 207 U.S. 398, 28 S.Ct. 133, 52 L.Ed. 264 (1907), this Court held that a maritime claimant could recover under state wrongful death laws if those laws purported to reach the maritime *situs* of the death. In 1920, Congress enacted two statutes. The Death on the High Seas Act, 46 U.S.C. § 761 *et seq.*, provided a remedy for deaths occurring outside the state's territorial waters, and embraced this Court's decision in *The Hamilton* by preserving state remedies for deaths occurring within territorial waters.

46 U.S.C. § 767. The Jones Act, 46 U.S.C. § 688, allowed seamen to recover against their employers for negligence resulting in death irrespective of the *situs* of the death.

Those responses provided to everyone a remedy of sorts, but not necessarily a very satisfactory remedy. A seaman had his Jones Act remedy for death caused by negligence (but not unseaworthiness) no matter where the death occurred. Anyone killed outside state territorial waters had a remedy in the Death on the High Seas Act. Those killed in state territorial waters had their state-law remedies under *The Hamilton*.

2) Application of state law in death cases was an exception to the general maritime rules of uniformity and federal supremacy.

This Court's reference to state wrongful-death laws in *The Hamilton* stood in marked contrast to an important line of cases that limited state power over maritime matters, and stressed uniformity and federal supremacy.

In the seminal case of *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086 (1917), this Court held that New York's worker's compensation statute could not be applied to the death of a longshoreman. The Court said that the provisions of the New York statute requiring insurance, creating liability without fault and basing compensation on loss of earning power served to "work material prejudice to the characteristic features of the general maritime law" and to interfere "with the proper harmony and uniformity of that law in its international and interstate relations." *Id.* at 216, 37 S.Ct. at 529, 61 L.Ed. 1086.

In *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372, 38 S.Ct. 501, 62 L.Ed. 1171 (1917), this Court held that a claimant was restricted to his maritime-law remedies rather than his more generous state-law remedies even where he brought suit in state court.

And in *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 40 S.Ct. 438, 64 L.Ed. 834 (1920), this Court invalidated a Congressional act that awarded waterfront workers their rights and remedies under state worker's compensation laws. This Court held that the impact of the amendment was to delegate to the states the exclusive authority of Congress to prescribe maritime rights and remedies, and that because such authority is non-delegable, the amendment was invalid. *Id.* at 164, 40 S.Ct. at 441, 64 L.Ed. 834. In so holding, this Court stressed the Constitutional requirement of federal primacy in maritime law arising out of the provision extending federal judicial power to "all cases of admiralty and maritime jurisdiction," U.S. Const. art. III, § 2, cl. 1, and the provision empowering Congress to pass laws "necessary and proper to carry out granted powers," U.S. Const. art. I, § 8, cl. 18. The Court read those grants of federal authority as directives to establish "harmonious and uniform rules applicable throughout every part of the Union." *Knickerbocker Ice Co., Id.* at 164, 40 S.Ct. at 441, 64 L.Ed. 834.

In *Jensen* and *Knickerbocker Ice*, this Court acknowledged that *The Hamilton* was inconsistent with the general rules of uniformity and federal supremacy in maritime matters, and was a narrow exception to those rules. *Jensen*, 244 U.S. at 216, 37 S.Ct. at 529, 61 L.Ed. 1086; *Knickerbocker Ice*, 253 U.S. at 166, 40 S.Ct. at 442, 64 L.Ed. 834.

3) This Court created a federal maritime law remedy for wrongful death.

With time, tension grew between the rule of maritime uniformity and federal supremacy on the one hand and a system that looked to state law as the remedy for maritime wrongful deaths on the other hand. Suppose, for example, that the injury at issue was caused by a breach of the warranty of seaworthiness. Did this mean that if the victim died instead of being injured, recovery depended upon whether the state wrongful-death statute encompassed the historic maritime concept of unseaworthiness? In *The Tungus v. Skovgaard,* 358 U.S. 588, 79 S.Ct. 503, 31 L.Ed.2d 524 (1959), this Court answered that question in the affirmative, declaring that when a maritime wrongful-death claimant invoked state law, he had to accept that law as a whole, complete with all limitations. The decision in *The Tungus* added new complexities to the problem of wrongful death in state territorial waters, and defeated uniformity altogether.

In 1970, this Court revisited the entire problem in *Moragne v. States Marine Lines, Ltd.,* 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970). After reviewing the unsatisfactory judicial and congressional efforts to deal with wrongful deaths in territorial waters, this Court concluded that the root of the problem was its holding in *The Harrisburg* that wrongful-death actions could not be maintained absent a statute. This Court overruled *The Harrisburg,* and created a new cause of action based on the federal maritime common law for wrongful death in territorial waters. In so doing, the Court again stressed the importance of uniformity, saying:

> Our recognition of a right to recover for wrongful death under general maritime law will assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts. [Citations omitted]. Such uniformity not only will further the concerns of both of the 1920 Acts but also will give effect to the constitutionally based principle that federal admiralty law should be 'a system of law coextensive with, and operating uniformly in, the whole country.'

Moragne, 398 U.S. at 401-02, 90 S.Ct. at 1788, 26 L.Ed. 2d 339. The question *Moragne* did not specifically answer, and which this case squarely poses, is whether that judicially created federal cause of action is the *exclusive* remedy for wrongful death in state territorial waters, or whether state wrongful-death statutes still have a role to play.

4) The rule of maritime uniformity outweighs any countervailing reasons that would permit application of state statutes to wrongful-death actions.

As we have seen, the application of state wrongful-death statutes in a maritime context was an exception to the general rule of maritime uniformity, and has been recognized as such. The issue of whether non-uniform state statutes still have a role to play in a maritime context depends upon the reason for their application as an exception to the uniformity rule.

(a) *Moragne* obviated the void-filling rationale for using state statutes.

This Court has articulated two reasons for applying state wrongful-death statutes despite the rule of maritime uniformity. The first reason was to fill the void in maritime law that arose when this Court held that maritime law did not recognize a cause of action for wrongful death. A typical explanation of the void-filling role of state law is found in *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 373, 79 S.Ct. 468, 480-81, 3 L.Ed.2d 368 (1959), where this Court said:

> It is true that state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system. But this limitation still leaves the states a wide scope. . . . State remedies for wrongful death and state statutes providing for the survival of actions, both historically absent from the relief offered by the admiralty, have been upheld when applied to maritime causes of action.

Moragne eliminated the void that the state statutes filled. So if state statutes had been invoked in maritime cases solely to fill the pre-*Moragne* void in maritime law, those statutes would have no place in a post-*Moragne* world, and the rule of maritime uniformity ought to control.

Plaintiffs suggested in their brief to the Texas Supreme Court that *Moragne* had only filled the void in maritime law for causes of action based on unseaworthiness, but that it did not address claims based on negligence. Plaintiffs asserted that *The Tungus* still permits application of state law to negligence claims. However, the courts that have explicitly considered that issue have disagreed with the plaintiffs' position and have interpreted *Moragne* as

providing a uniform maritime remedy for death caused either by negligence or unseaworthiness. *See Nelson v. United States*, 639 F.2d 469, 473 (9th Cir. 1980); *Matter of S/S HELENA*, 529 F.2d 744 (5th Cir. 1976). So although *Moragne* may not have explicitly overruled *The Tungus*, it did render *The Tungus* obsolete.

(b) The states' sovereignty interests in applying their death statutes have never outweighed the maritime rule of uniformity.

The second reason for recognizing state wrongful-death statutes as exceptions to the rule of maritime uniformity was the notion that states may govern their own territorial waters until and unless such self-governance collides with the need for national uniformity. In *Just v. Chambers*, 312 U.S. 383, 391, 61 S.Ct. 687, 693, 85 L.Ed. 903 (1941), this Court alluded to that sovereignty interest when it called admiralty's cognizance of state wrongful-death statutes "a broad recognition of the authority of the States to create rights and liabilities with respect to conduct within their borders when the state action does not run counter to federal laws or the essential features of an exclusive federal jurisdiction."

If a state court's power to apply its own wrongful-death law in territorial waters were justified as an attribute of state sovereignty, then *Moragne* would not control, since it does not undermine the sovereignty justification for applying state law. However, as *Just* recognized, the sovereignty interest ends where state law collides with "the essential features" of maritime law. And whenever the question has presented itself, this Court has declared

that stacking state-created remedies atop federally recognized remedies is just such a collision with an "essential feature" of maritime law. *See, e.g., Offshore Logistics v. Tallentire*, 477 U.S. 207, 106 S.Ct. 2485, 91 L.Ed.2d 174 (1986) (state wrongful-death remedies cannot be used to supplement remedies provided by Death on the High Seas Act for death occurring beyond state territorial waters); *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372, 382, 38 S.Ct. 501, 503, 62 L.Ed. 1171 (1917) ("[N]o state has power to abolish the well-recognized maritime rule concerning measure of recovery and substitute therefor the full indemnity rule of the common law"). Unless this Court is prepared to abandon *Chelentis*, the general rule of maritime uniformity must take precedence over any interest Texas may have in applying its own wrongful-death law in its own territorial waters.

The Texas appellate court herein noted section 7 of the Death on the High Seas Act, which says:

> The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State . . .

46 U.S.C. § 767. Although that statute does not directly address this case, which does not involve death on the high seas, the Texas appellate court thought it had discerned in section 7 a congressional endorsement of the state's sovereignty interests. App. A at 16a, 777 S.W.2d at 790. In *Moragne*, this Court considered at length the argument that section 7 preserved the state's power over territorial waters as an attribute of sovereignty. The Court rejected that sovereignty argument, and held that section

7 was meant only to preserve the void-filling function that state law served at the time section 7 was enacted. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 395-405, 90 S.Ct. 1772, 1785-89, 26 L.Ed.2d 339. This Court has reaffirmed that interpretation of section 7 on other occasions. *See, e.g., Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 228, 106 S.Ct. 2485, 2497, 91 L.Ed.2d 174 (1986) (DOHSA reference to state-court jurisdiction refers only to power of state court to hear action, "not the legislative ability to supply a different standard of recovery"); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 622, 98 S.Ct. 2010, 2013, 56 L.Ed.2d 581 (1978) (section 7 enacted to prevent DOHSA from abrogating pre-*Moragne* state-law remedies for death in territorial waters).

5) Those appellate courts that have considered the question have concluded that after *Moragne*, federal rather than state law applies to maritime wrongful deaths in state territorial waters.

As we previously pointed out, the circuit courts have decided that *Moragne* completely eliminated state-law causes of action for deaths in territorial waters. *Lyon v. Ranger III*, 858 F.2d 22, 27 (1st Cir. 1988); *Nelson v. United States*, 639 F.2d 469 (9th Cir. 1980); *Matter of S/S Helena*, 529 F.2d 744 (5th Cir. 1976); *Petition of United States Steel Corp.*, 436 F.2d 1256, 1279 (6th Cir. 1970), *cert. denied* 402 U.S. 987, 91 S.Ct. 1649; *reh'g denied* 403 U.S. 924, 403 U.S. 940, 91 S.Ct. 2247 (1971). In the *Helena*, the court specifically addressed both the void-filling and state-sovereignty justifications

for the prior reliance on state law. With respect to void-filling, the court said that *Moragne* "filled this void and terminated this need for recognition of the state statutes." 529 F.2d at 752. With respect to state sovereignty, the court read *Moragne* as subordinating state sovereignty interests to the national interest in maritime uniformity.

In the foregoing cases, the plaintiff invoked the federal court's admiralty jurisdiction, whereas here, the plaintiff sued in state court. That difference, however, is not dispositive. Federal law gives to the federal courts complete and exclusive jurisdiction over martime matters in the first instance by virtue of 28 U.S.C. § 1333, which declares:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction . . .

The statute then relinquishes some of that exclusive jurisdiction back to the state courts by "saving to suitors in all cases all other remedies to which they are otherwise entitled," 28 U.S.C. § 1333(1). Thus, state courts have no inherent power over maritime matters, but exercise only the powers "saved" to them by federal law. That federal law, in turn, can limit and condition the state court's exercise of power over maritime matters.

An unbroken line of cases from this Court holds that when claimants bring their admiralty or maritime matters in state court (or on the "law side" of federal court if diversity jurisdiction exists), federal rather than state substantive law applies. In *Offshore Logistics, Inc. v.*

Tallentire, 477 U.S. 207, 222-23, 106 S.Ct. 2485, 2494, 91 L.Ed.2d 174 (1986), this Court said:

> [T]he "savings to suitors" clause allows state courts to entertain *in personam* maritime causes of action, but in such cases the extent to which state law may be used to remedy maritime injuries is constrained by the so-called "reverse-*Erie*" doctrine which requires that the substantive remedies afforded by the States conform to governing federal maritime standards.

See also, e.g., Kermerac v. Compagnie Generale Transatlantique, 358 U.S. 626, 79 S.Ct. 406, 3 L.Ed.2d 550 (1959) (non-seaman's suit for injury aboard berthed ship governed by maritime law, not state law, no matter whether suit filed in federal or state court); *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372, 384, 38 S.Ct. 501, 504, 62 L.Ed. 1171 (1917) ("without regard to the court where he might ask relief, petitioner's rights were those recognized by the law of the sea"). Thus, if federal law pre-empts state law in wrongful-death actions brought under federal admiralty jurisdiction, as the post-*Moragne* cases hold, federal law also pre-empts state law when such cases are brought in state court.

The Texas appellate court misread the meaning of the "savings to suitors" clause. It suggested that the clause empowers state courts to "follow their own notions about this [maritime] field of law," App. A at 16a-17a, 777 S.W.2d at 790. As we have seen, though, the "savings" clause only empowers state courts to entertain maritime actions. When they do, they still must apply federal law rather than "follow their own notions" about maritime matters.

B. The Texas Court Mis-Applied Controlling And Important Federal Law When It Ruled That Tran's Death Did Not Involve A Maritime Tort.

In addition to erroneously holding that the Texas state wrongful-death act could apply to a death that occurred in state territorial waters, the appellate court erroneously held that the incident was not a maritime tort. App. A at 17a, 777 S.W.2d at 790. The court noted that "the actual death-producing trauma was experienced on or at the dock," which it called "an extension of the land," App. A at 12a-13a, 777 S.W.2d at 788-89. The appellate court, apparently focusing on Tran's activities at the time of the accident, found that the negligence at issue had "no significant relationship" to traditional maritime activity, App. A at 17a, 777 S.W.2d at 790. The court declared that "because of the locale of the injury," and because of "the lack of impact on general maritime commerce and navigation," the facts "as found by the trial bench do not constitute a maritime tort." *Id.*

That holding conflicts fatally with federal law. In the classic case of *Executive Jet Aviation, Inc. v. City of Cleveland,* 409 U.S. 249, 268, 93 S.Ct. 493, 504, 34 L.Ed.2d 454 (1972), this Court enunciated a two-prong test of maritime jurisdiction, and held that a maritime tort is one that not only occurs at a maritime locality, but that bears "a significant relationship to traditional maritime activity." That two-prong test was designed to insure that maritime jurisdiction did not expand beyond the substantive contours of admiralty law. The Court described admiralty law as "rules that govern the manner and direction those vessels may rightly move upon the waters," *Id.* at 269-70, 93 S.Ct. at 505, 34 L.Ed.2d 454.

In our case, the trial court found that the producing cause of the accident in question was the wrongful manner in which the vessel TEXACO CALIFORNIA moved upon the navigable waters of the Sabine River. This, then, is a classic "maritime tort" squarely governed by maritime law. *See also Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674, 102 S.Ct. 2654, 2658, 73 L.Ed. 2d 300 (1982) (negligent operation of vessel on navigable waters maritime tort as a matter of law even if operation not commercial).

Federal statutory law also places allegedly negligent operation of a vessel squarely within the ambit of maritime jurisdiction. The Admiralty Extension Act of 1948 provides:

> The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

46 U.S.C. § 740. So Congress, like this Court, has declared that injuries caused by vessels operating on navigable waters are maritime in nature.

The appellate court's statement that this incident was not a maritime tort was no mere fact-finding error. The opinion states, "we decide that the governing, ultimate facts, as found by the trial bench, do not constitute a maritime tort," App. A at 17a, 777 S.W.2d at 790. By applying its view of the law to the facts as found at trial, the appellate court plainly intended to hold that if an injury is felt on or near land, the matter is not a maritime

tort even though the producing cause of the injury is specifically found to be the negligent operation of a commercial vessel on navigable waters. That holding conflicts with the controlling pronouncements from Congress and this Court cited previously. Because the holding usurps the traditional core of federal admiralty and maritime jurisdiction, the matter is sufficiently important to warrant review by way of certiorari.

C. If Texas Is Allowed To Apply Its Own Body Of Laws To Wrongful Death In Territorial Waters, The Effects Will Extend Far Beyond Texas.

The Texas appellate court decision would be troublesome enough if it were merely a precedent for application of Texas state law to wrongful deaths occurring in Texas territorial waters. But the effects of the decision could be much more far-reaching.

In *Dow Chemical Co. v. Alfaro,* 33 Tex. S. Ct. J. 326 (March 28, 1990), the Texas Supreme Court held that Texas does not recognize the doctrine of *forum non conveniens,* and that therefore, a claimant may sue in Texas for death or injury occurring anywhere in the world so long as Texas can assert personal jurisdiction over the defendant. When such a suit is brought, the courts do not mechanically apply the substantive law of the place of the wrong or injury, but are to apply "the rules of substantive law that are appropriate under the facts of the case," *Id.* 33 Tex. S. Ct. J. at 327, quoting Tex. Civ. Prac. & Rem. Code Ann. § 71.031(c) (Vernon 1986).

The Fifth Circuit has expressed alarm over the problems Texas could cause if its courts failed to recognize *forum*

non conveniens in the maritime context. In *Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307, 324 (5th Cir. 1987), *rev'd on other grounds*, 486 U.S. 140, 108 S.Ct. 1684, 100 L.Ed.2d 127 (1988), that court enjoined a Texas state court from hearing a maritime death case that the federal courts had already dismissed on *forum non conveniens* grounds. At that time, before *Alfaro*, Texas had not squarely decided whether it would or would not recognize the doctrine of *forum non conveniens*, but the mere possibility that Texas might refuse to recognize the doctrine was enough to persuade the Fifth Circuit to affirm an injunction against state proceedings. After discussing the various anomalies that could arise if Texas state courts heard maritime cases from around the world, the Fifth Circuit said, "We cannot tolerate this pointless intrusion on the basic uniformity of the maritime law." *Id.* 817 F.2d at 321.

This Court reversed, but on the narrow grounds that the federal courts had improperly enjoined a pending state proceeding, *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 108 S.Ct. 1684, 100 L.Ed.2d 127 (1988). However, this Court did not reach the question of whether Texas could apply its open-forum law in a maritime context, or whether federal *forum non conveniens* rules pre-empted state law. Rather, this Court said that the pre-emption issue was one for the state courts to decide in the first instance.

In our case, the issue of whether federal general maritime law pre-empts Texas state law is presented in a different context. Here, Texas has decided that its own wrongful-death law can apply in territorial waters. That threat to the characteristic uniformity of maritime law is heightened by Texas's declaration that it will hear any

case in which it can exercise personal jurisdiction over the defendant. The holding in our case, combined with the holding in the recent *Alfaro* case, create exactly the kind of "intolerable, pointless intrusion" into maritime uniformity that the Fifth Circuit foresaw in the *Chick Kam Choo* case.

D. The Texas Court Did Not Decide This Matter On An Adequate And Independent State Ground.

Prior to discussing and resolving the maritime-law issues, the Texas court said that if Texaco believed maritime law applied, it "should have pleaded that Dau Van Tran was a seaman" as an affirmative defense, and "should have pleaded facts invoking the general maritime law, or general admiralty law." App. A at 13a, 777 S.W. 2d at 789. Despite what plaintiffs may argue, those statements cannot rise to the level of adequate and independent state grounds on which to sustain the judgment without considering the significant issues of national importance that this case raises.

A close reading of the opinion, and examination of Texas law, shows that the appellate court's statements were merely advisory to future litigants. Nowhere does the appellate court say that Texaco waived its contention that maritime law applied. Indeed, the court's detailed discussion of the merits of the maritime issues and the specific holdings on those issues show that the court ruled on the merits, not on the basis of a pleadings defect. App. A at 17a, 777 S.W.2d at 790.

Basic principles of Texas pleading practice support the lower court's obvious determination that Texaco's failure to plead application of the general maritime law was not

a waiver of its contention that maritime law governed the claims against it.

First, any pleading defect is waived unless the party later relying on the defect makes a proper objection. *Cactus Drilling Corp. v. Hager*, 487 S.W.2d 758 (Tex. Ct. App.—El Paso, 1972, no writ); Rule 90, *Tex. R. Civ. P.* Plaintiffs did not object at trial to Texaco's contentions that the general maritime law applied. To the contrary, plaintiffs themselves pleaded:

> In addition, Plaintiffs allege that the decedent was a Jones Act seaman, and is entitled to recover not only for violation of the Jones Act but also under general maritime law.

(App. G at 39a). Then when Texaco filed its post-trial motion to reform the judgment to delete certain items of damage, plaintiffs did not complain that Texaco had failed to plead application of the general maritime law. Rather, plaintiffs responded by filing a Motion to Amend Findings of Fact, (Appendix K at 62a-63a), in which they sought increased damages for loss of companionship, affection and society should maritime law be applied and damages for mental anguish stricken.

Second, Texas law holds that an omission in pleadings, including a failure to plead an affirmative defense, is cured if the omitted issue is raised in the pleadings of another party, because the other party's pleadings provide notice that the issue will be tried. *Land Title Co. of Dallas, Inc. v. F.M. Stigler, Inc.*, 609 S.W.2d 754 (Tex. 1980). Since plaintiffs themselves pled application of the general maritime law, there was no need for Texaco to do so.

Because the Texas appellate court did not hold that Texaco had waived its contentions concerning application

of the general maritime law, the comments concerning pleading cannot be construed as an "adequate" state-law basis for the decision.

Nor can the appellate court's decision be construed as "independent" of federal law. The appellate court said that it was Texaco's "basic position" that Tran was a seaman, App. A at 12a, 777 S.W.2d at 788, suggesting that the court viewed seaman status as triggering application of maritime law. It is not and was not Texaco's position that Tran was a seaman, nor is seaman status a necessary predicate to invoking the general maritime law. *See, e.g., Kermerac v. Compagnie Generale Transatlantique,* 358 U.S. 625, 79 S.Ct. 406, 3 L.Ed.2d 550 (1979) (non-seaman's injuries aboard berthed vessel governed by maritime law, not state law). So the appellate court's observations about what Texaco might have pled reflect a misunderstanding of federal law. When a lower court's procedural ruling depends on an antecedent question of federal law that is intermixed with the merits of the case, review by this Court is proper. *International Longshoremen's Ass'n, AFL-CIO v. Davis,* 476 U.S. 380, 106 S.Ct. 1904, 90 L.Ed.2d 389 (1986); *Ake v. Oklahoma,* 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985).

The question of whether the state-court decision rested on adequate and independent state grounds is itself a federal question. *Michigan v. Long,* 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983). As the foregoing discussion shows, the Texas appellate court's advisory suggestions about pleadings do not constitute adequate or independent state grounds for decision, and this Court is free to address the merits of the state court's decision.

CONCLUSION AND PRAYER FOR RELIEF

As Texaco has argued, the Texas appellate court's application of the state wrongful-death act to the maritime tort at issue in this case was error, since the case should have been decided according to the rules and principles of the federal general maritime law. That law, among other things, forbids recovery of damages for mental anguish and may bar recovery of prejudgment interest. Texaco respectfully prays for an order of this Court remanding the matter to the Texas state courts with instructions to apply the federal general maritime law to the facts as found by the trial court, and to make all adjustments necessary to conform the judgment to the federal general maritime law.

Respectfully submitted,

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APPENDIX

APPENDIX A

COURT OF APPEALS
NINTH DISTRICT OF THE STATE OF TEXAS
1001 Pearl, Suite 330
Beaumont, Texas 77701

Shirley Forrest,
Clerk

Judgment entered August 31, 1989

No. 09-89-009 CV

Texaco Refining & Marketing, Inc., et al

vs.

Estate of Dau Van Tran, et al

Appealed from the 60th District Court of
Jefferson County, Texas

Opinion by Justice Jack Brookshire

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this Court that there was no error in the judgment; it is therefore considered, adjudged and ordered that the judgment of the Court below be in all things affirmed and that all costs of the appeal be assessed against the appellants, Texaco Refining & Marketing, Inc. and Texaco Marine Services, Inc. A copy of this judgment shall be certified below for observance.

A true copy of the judgment, to be entered, I hereby certify.

/s/ SHIRLEY FORREST
Shirley Forrest,
Clerk

TEXACO REFINING & MARKETING, INC.,
and Texaco Marine Services, Inc.,
Appellants,

v.

ESTATE OF Dau Van TRAN, Vi Thi Pham, Do Van Tran, Farmer Boy's Catfish Kitchens International, Inc., Theresa Nguyen and Anh Nguyen,
Appellees.

No. 09-89-009-CV.

Court of Appeals of Texas,
Beaumont.

Aug. 31, 1989.

OPINION

BROOKSHIRE, Justice.

Originally, the Appellees, Vi Thi Pham and Do Van Tran, brought this cause of action based, primarily, on negligence and gross neglect, to recover their damages and injuries arising out of the death of Dau Van Tran. Dau was their son. He died on September 16, 1985. The pleadings alleged that Dau was crushed to his death between a shrimp boat and a dock or dock barge.

The litigation was initiated against the Texaco Refining & Marketing, Inc. (TRMI) and Texaco Marine Services, Inc. (TMSI). TRMI and TMSI were said to be the owners and operators of a certain seagoing vessel named TEXACO CALIFORNIA. Farmer Boy's Catfish Kitchens International, Inc. (Farmer Boy's) was a party-defendant, being the alleged owner of the dock at which the fishing trawler was tied up.

TRMI and TMSI filed a third-party action against Theresa Thi Nguyen and Anh Nguyen, the owners of the trawler, MISS MARY, on the theories of contribution and indemnity and maintaining that the Nguyens were directly responsible to Pham and Tran. A trial followed without the intervention of a jury. There were numerous Findings of Fact and separate Conclusions of Law. Judgment was cast against TRMI and TMSI, including some limited, prejudgment interest and post-judgment interest. No punitive damages were awarded. TRMI and TMSI failed in their action over and against Farmer Boy's. Several post-judgment motions were filed. TRMI and TMSI did not prevail in any of these motions. This appeal timely followed.

In a well-briefed and scholarly-presented point of error, the Appellants charge that there is no evidence to support the finding of the Bench and the judgment thereon relative to the Appellants' negligence and its proximate causation of any damages. Their argument is that any conceivable liability (either negligence or proximate causation) is based solely on the opinion testimony of experts proffered by the plaintiffs below (Pham and Tran). The Appellants state that the testimony of these experts relies upon hearsay with absolutely no independent evidence of

numerous, vital facts. Texas Rules of Civil Evidence, it was acknowledged, had become fully effective on September 1, 1983. *TEX. R. CIV. EVID. 701,* to and including *705,* delineated a significant departure from the previous rules of the admissibility of evidence and of the opinion testimony of experts.

TEX. R. CIV. EVID. 702 permits scientific, technical or other specialized knowledge which will assist the trier of fact to understand the evidence or to resolve a fact that is in issue. Then, a witness, who is qualified as an expert by either knowledge, skill or experience, may testify thereto "in the form of an opinion or otherwise". Independent of *Rule 702* is *Rule 703,* authorizing an expert to base his opinion on facts or data made known to that expert at the trial or before the trial. The expert may base an opinion, or an inference, on facts or data perceived by the expert or made known to him. Significantly, if the facts or data are of a type that are reasonably relied upon by the experts in the particular field involved in forming their expert opinions or inferences upon the particular subject matters; then the facts or data, themselves, need not be admissible.

TEX. R. CIV. EVID. 704 was certainly a significant, if not a revolutionary, change. *Rule 704* dramatically stated:

> "Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

And, of course, *TEX. R. CIV. EVID. 705* has importance here in that it permits an expert to testify as to

his opinions, as to his inferences, and give his reasons therefor without a prior disclosure of the underlying facts or data, subject to the trial bench's discretionary rulings.

The father and mother of Dau Van Tran maintain that a large wave, of considerable force and height, was caused by the passage of the tanker, TEXACO CALIFORNIA. They pleaded that the speed of the TEXACO CALIFORNIA was excessive and the excessive speed caused the wave and proximately caused the death of Dau Van Tran, their oldest son.

There was a witness fairly near the scene of the tragedy at the time, one William Cooner. Cooner testified that he saw a large wave come up on the shore. The wave washed 120 to 130 feet inland. He further stated that he did not see any vessel, however, which might have caused that wave. Mr. Cooner stated that the wave he testified about was the largest surge, or largest wave, he had ever witnessed. He further swore that not seeing a vessel was not unusual because, by the time the wave, wake or surge gets to the dock or the shore, the distance traveled by the large wave is so great that the vessel causing the same would be down past a certain public park and could not be seen that far off.

Extensive pretrial discovery was developed. Each side, in the discovery process, exhibited thoroughness, diligence and detailed attention to the fact issues to be tried. To one set of interrogatories, the Appellants answered that, on or about September 16, 1985, the vessel, TEXACO CALIFORNIA, did pass the Fisherman's Reef barge dock, located in Sabine Pass, in Jefferson County. This dock was owned or leased by Farmer Boy's. This was an answer made by Texaco Refining and Marketing, Inc., the

owner at the time in question of the seagoing tanker. These answers were sworn to by the affiant who made oath that he had personal knowledge of these facts. His sworn affidavit was dated October 27th, 1987. Is is correct that, later, this answer was changed. It is interesting to note that the very question was asked in previous federal court interrogatories. It was previously answered "Yes". The litigation had been originally filed in the United States District Court. Apparently, the Defendants/Appellees impleaded a third-party defendant, which was a Texas corporation.

The decedent's probate estate was open and pending in the Jefferson County Probate Court and, in view of the nature of the parties' citizenships, the federal court case was non-suited and the case refiled in the state court.

Certain responses made to the interrogatories stated that TRMI admitted that the TEXACO CALIFORNIA made speed of about 8.8 knots from buoy 47 to buoy 40, then approximately 11.3 knots from buoy 40 to buoy 38 and, later, 9.7 knots from buoy 38 to buoy 32. Mr. Owens, a maritime expert, testified that he confirmed these various speeds by checking the distances and the times involved. Owens stated the speeds were also documented in the Deck Log and Bell Sheets of the vessel. Owens also further swore that the average transit speed of the tanker was 9½ knots. It is sufficient to state that the experts put on the stand by the Plaintiffs/Appellees swore that the seagoing tanker was not practicing good seamanship. One expert characterized these speeds as "barreling down". The expert further testified that the TEXACO CALIFORNIA was negligent in its speed and its seamanship;

that is, the good seamanship that she, the vessel, failed to employ. We find, in the record:

> "Q In other words, it was negligent in several different areas?
>
> "A Yes, I do. Certainly Scott and the Skipper should have been able to appraise this area. They have been through there enough. That's a total disregard for the rights of others moored along in there.
>
> "Q As a matter of fact, I was going to ask you if you had an opinion as to whether or not their conduct on this particular occasion constituted gross negligence if we assume that gross negligence is the entire want of care which would raise the belief that the acts or omissions complained of was the result of a conscience indifference to the rights or welfare of the person or persons to be affected by it?
>
> "A Yeah. I figure that's gross negligent [sic] on their part, yes, I do.

Mr. Cooner was looking in the correct direction when he saw a large wave come upon the beach and roll back upon and beyond the shoreline to a depth of about 120 feet to 140 feet. This large wave, or surge, occurred sometime around 2:00 or 2:30 P.M. On September 16, 1985, the TEXACO CALIFORNIA took her pilot aboard at 1304. Her last line was off at 1326.

The record reflects that the TEXACO CALIFORNIA passed buoy 47 at 1353 hours on September 16, 1985. At buoy 47, the record reflects that the vessel was traveling 8.8 knots but that its minimum steerageway speed was estimated at 2½ to 3 knots. The time of the large wave, or surge, is compatible with the time of the death of Dau Van Tran.

A second expert, placed on the stand by Tran and Pham, a Mr. Roger L. Owens, expressed an opinion based on information he had, plus his research, calculations and on-site inspections. He said the cause of the accident made the basis of this suit was:

> "A . . . [J]ust excessive speed of a very large loaded vessel transiting the Canal."

Further, Mr. Owens used a definition of gross negligence as being "that entire want of care which would raise the belief that the act or omission complained of was a result of a conscious indifference to the right or welfare of a person or persons to be affected by it", and Owens, reaffirming that he understood the definition, was asked if he had an opinion as to whether or not the TEXACO CALIFORNIA was grossly negligent. His answer was:

> "A Yes, because the Master was grossly negligent."

Other evidence of probative force exists in the record, which was admissible as opinions and inferences of the experts under *TEX. R. CIV. EVID. 702, 703, 704* and *705*. This was a bench trial where an experienced district judge could properly weigh the testimony of the witnesses and assess the credibility that the testimony merited. A presumption exists that the judge considered only proper evidence.

Upon analysis, and upon applying the accepted standards for appellate review, we overrule the Appellants' first point of error. *Garza v. Alviar*, 395 S.W.2d 821 (Tex. 1965); *In re King's Estate*, 150 Tex. 662, 244

S.W.2d 660 (1951); R. Calvert, "*'No Evidence' and 'Insufficient Evidence' Points of Error*", 38 TEXAS L. REV. 361 (1960). Compellingly similar standards govern bench trials.

Appellants' Point of Error II is:

> "There is no evidence of record to support the award of survival damages."

An ambulance service received an emergency call at about 1425 hours on September 16, 1985. The ambulance arrived in Sabine Pass at 1447 hours, picked up Dau Van Tran, and left Sabine Pass at 1502 hours and arrived at the hospital in Port Arthur at 1523 hours. There exists a narrative account of the medical assistance that was afforded to Dau Van Tran by the Diamond Emergency Medical Services.

In addition, a witness, who qualified as an expert, named Captain Robert J. Underhill, testified that the MISS MARY was pulled out, fetched back on her lines and then came slamming back in because of the large wave. When the MISS MARY came slamming back in, according to the expert, it slammed Dau Van Tran between its side and the dock barge. This was described as a pretty violent blow to the body of Dau, the violent blow resulting from the excessive speed of the TEXACO CALIFORNIA, and from nothing else, according to Captain Underwood. His testimony was that the young man was still conscious after the incident took place and that Dau had been moaning and uttering groans. Dau was alive when he left the scene of the occurrence and the record reflects that Dau survived for at least 35 to 40 minutes. We conclude that there was sufficient evidence

to support the Bench's finding that Dau suffered conscious pain and conscious suffering for about 35 to 40 minutes. The award for this element of damages was not excessive. For example, in *Gulf States Utilities Co. v. Reed*, 659 S.W.2d 849 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.), an award was made in the amount of $10,000. to a mother for the pain and suffering of her son. The pain and suffering had a duration of approximately 5 seconds.

In another, somewhat parallel and persuasive, case, a citizen of the United States of Mexico recovered $175,000. for conscious pain and suffering during an undetermined amount of time. That case is *Levinge Corp. v. Ledezma*, 752 S.W.2d 641 (Tex. App.—Houston [1st Dist.] 1988, no writ). In that situation, the employer's accident report revealed that the time of injury was about 3:05 p.m. The arrival of the injured person at the emergency room occurred about 3:30 p.m., the death occurring at 3:43 p.m. A fellow worker saw the deceased fall from a pickup truck, hit the ground and bounce and jerk. The witness testified that the man's eyes were open and he was coughing and gasping for air and that blood was spurting forth from his mouth in a steady emission. The deceased was trying to expectorate it. The Houston Court of Appeals declined to substitute its own judgment for that of the trier of the facts, stating that it could only do so if the record clearly indicated that the award was based upon passion, prejudice, improper motive or was so excessive as to actually shock the conscience of the jurists. We do not find these passions and improper motives here. *See and compare K-Mart Apparel Fashions Corp. v. Ramsey*, 695 S.W.2d 243 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

Nextly, the Appellants advance that prejudicial error was committed when the trial court sustained the objections of the Appellees to the testimony of the Appellants' designated expert witnesses. The designation by the Appellants of their expert witnesses was made somewhat less than 30 days prior to the start of the trial on the merits.

The significant facts are that, on two occasions prior to the late letter adding the Appellants' two experts, Gilbert and Horne, the Appellants had answered "unknown at present" when the Plaintiffs/Appellees attempted to ascertain the identity of all the expert witnesses to be proffered by the Appellants. The Appellants have simply failed to meet their burden of good cause in the sense that they have failed to convince the trial bench that their late designation of the two experts was reasonable. The recent trend of the decisions on the discovery rules is that the imposition of either penalties or sanctions for the failure, delay or refusal of a party to comply with discovery rules rests within the sound discretion of the trial court. The trial court has the burden of seeing to it that the discovery rules are followed after having been clearly mandated by our Supreme Court. The trial court also has the burden, to a great extent, to see that the case is properly prepared for an adequate and truth-seeking trial on the merits. The decisions reached by the district bench, in an attempt to obtain compliance with the discovery rules, cannot be reversed unless the appellate court determines that the trial bench abused its discretion as a matter of law. We simply cannot make such a finding under this record. *Alexander v. Barlow*, 671 S.W.2d 531 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.); *Jarrett v. Warhola*, 695 S.W.2d 8 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd).

The Appellants' brief next advances that it was error to award damages for past and future mental anguish; and that it was clearly error for the trial court to award prejudgment interest thereon. *See and compare Moore v. Lillebo*, 722 S.W.2d 683 (Tex. 1986); *Clifton v. Southern Pacific Transp. Co.*, 709 S.W.2d 636 (Tex. 1986).

The basic position taken by the Appellants is that the deceased, Dau Van Tran, was a seaman and Dau was injured and met his death on navigable waters and, therefore, the general maritime law should not only control but be the exclusive law applicable. Under the general maritime law, the Appellants argue that any damages for mental pain or mental anguish, or any interest, should be entirely disallowed. However, as a defensive matter, it was never pleaded that Dau was a seaman. The court did not find that Dau was a seaman.

The Appellants' live pleadings was their Original Answer which set up, generally, the defenses of contributory negligence, negligence of third party, assumption of risk and unavoidable accident. It is not shown in the record that Dau was a seaman. The record reflects that he worked for himself and that he was in the nature of a volunteer when attempting to help out an older man who was the Captain of the MISS MARY by retrieving or relieving some sort of an object from around or near the propeller. The record shows that he was not being paid by anyone and that he volunteered to help a much older man, a Mr. Yen Nguyen. There is ample evidence of probative force that, as a result of the large wave and surge, that protruded upon the land 120 feet to 130 feet, or more, the MISS MARY was pulled out, fetched up on her lines and then slammed back in against the dock barge. There

is evidence that Dau was against the dock barge between two tires and the slamming back in of MISS MARY was strong enough to squash the two tires and Dau Van Tran as well. Therefore, the actual death-producing trauma or injury was experienced on or at the dock. Such a dock, or barge dock, has been recognized as an extension of the land. From the record, it was shown that death occurred within the State territorial waters.

It is clear, in the present case, that the Appellees sought to obtain a judgment against the Appellants based on the theory of negligence under the Texas Wrongful Death Statute. *TEX. CIV. PRAC. & REM. CODE ANN. Secs. 71.001-71.002* (Vernon 1986), and the Texas Survival Statute *TEX. CIV. PRAC. & REM. CODE ANN. Sec. 71.021* (Vernon 1986). The Appellees did not plead for relief under the doctrine of unseaworthiness. They did not invoke the maritime law.

As the points were presented and argued on appeal, we conclude that the Appellants should have pleaded that Dau Van Tran was a seaman. They should have pleaded facts invoking the general maritime law, or general admiralty law. Appellants' pleadings do not exclude the Texas Wrongful Death Statute nor the Survival Statute. Vis-a-vis the Plaintiffs'/Appellees' live pleadings at the trial bench, TMSI's and TRMI's contentions as to the status of Dau Van Tran was in the nature of an affirmative defense. *TEX. R. CIV. P. 94* required such an affirmative pleading to give fair and reasonable notice to the Plaintiffs below. This, the Appellants failed to do. Indeed, there is documentary evidence in the case that Dau Van Tran was self-employed and simply had no employment relationship to the MISS MARY or the

captain thereof. There is really no contention and there is no question but that Dau Van Tran was not a longshoreman. He simply did not fit under the definition of a longshoreman, under the Longshore and Harbor Workers' Compensation Act, *33 U.S.C.A. Sec. 901* et seq. (1986). The tragic death occurred within the city limits of Port Arthur, Jefferson County. There is no application, here, of death on the high seas act, popularly known as "DOHSA", *46 U.S.C. Sec. 761* et seq. The high seas have been authoritatively limited as being more than one league, or about 3 miles, off the shoreline.

As early as 1928, the Supreme Court of the United States has held that a stage and a wharf are generally deemed to be an extension of the land. *T. Smith & Son, Inc. v. Taylor,* 276 U.S. 179, 48 S.Ct. 228, 72 L.Ed. 520 (1928). Importantly, *Executive Jet Aviation, Inc. v. Cleveland,* 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972), pointed out that a maritime locality, alone, was not sufficient to invoke the exclusive admiralty jurisdiction. Justice Stewart stressed that the main business of the admiralty court involves claims for cargo damage, collisions of vessels, injuries to seamen and the like. The Supreme Court of the United States found serious difficulties with using the locality test only, further pointing out that, for the federal admiralty jurisdiction to come into play, there must be a maritime nexus or connection; that is, some substantial relationship between the tort and traditional maritime activities, such as navigation or commerce on navigable waters. When such a relationship or nexus is absent, the fact that a tort may have occurred upon navigable waters is immaterial to any meaningful and determinative invocation of the jurisdiction of the admiralty courts.

The Fifth Circuit Court of Appeals for the United States, in 1981, decided *Karpovs v. State of Mississippi*, 663 F.2d 640 (5th Cir. 1981). Circuit Judge Politz, writing without a dissent, held, at page 648:

> ". . . Maritime jurisdiction does not extend to torts occurring on piers, bridges, jetties, or even ramps or railways running into the sea. *Rodrique v. Aetna Casualty Co.*, 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360 (1969). Any suggested inroads on this long-standing rule ended in 1972, when the Supreme Court held that in addition to a maritime locality, admiralty jurisdiction will not lie unless there is a significant relationship between the tort claim and traditional maritime activity. *Executive Jet Aviation, Inc. v. Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972); *Richardson v. Foremost Insurance Co.*, 641 F.2d 314 (5th Cir. 1981).

We simply find no significant relationship between the negligence claim herein and traditional maritime activity.

From the standpoint of parallel reasoning and analagous rationale and an analysis of the clear, congressional purpose, the compelling case is *The Tungus v. Skovgaard*, 358 U.S. 588, 79 S.Ct. 503, 3 L.Ed.2d 524 (1959). In *The Tungus, supra*, the Supreme Court reasoned and held that a policy expressed and enacted by the legislature of a sovereign state in passing a wrongful death statute is not merely that the death shall give rise to the right of recovery, nor that the tortious or negligent conduct resulting in the death shall be actionable; but, just as importantly, the damages provided by the wrongful death statute shall be recoverable when actions or omissions of a particular kind result in a death. Thus, it becomes in-

cumbent upon a court enforcing that legislative policy to enforce it all. The enforcing court may not pick or choose.

The Supreme Court reasoned that congressional enactments, such as the Death on the High Seas Act, clearly manifest that the rights, remedies and damages under the state death statutes (when deaths occur on state territorial waters), were all to be left unimpaired and that the overall intent of the Congress was to preserve; indeed, to insure the state's sovereignty over death actions even though caused by maritime torts occurring with the state's territorial waters. *See Mobil Oil Corp. v. Higginbotham,* 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978). In 436 U.S., at page 620, Footnote 9, 98 S.Ct., at page 2012, Footnote 9, 56 L.Ed.2d, at page 584, Footnote 9, it reads:

> "9. Sec. 766. In addition, the statute preserved the applicability of local law on the Great Lakes, in the Panama Canal Zone, and within the States' territorial waters. Sec. 767. Rights under foreign wrongful-death laws were also preserved. Sec. 764."

Justice Oliver W. Holmes, a giant of a jurist, reasoned, in *Old Dominion Steamship Co. v. Gilmore,* 207 U.S. 398, 28 S.Ct. 133, 52 L.Ed. 264 (1907), that Congress had the power to regulate commerce and to legislate upon admiralty and maritime jurisdiction; further, the Congress could extend the judicial power to cases of admiralty and maritime jurisdiction. The Congress had been silent up to a point. Justice Holmes held that the savings to the suitors clause leaves open and in full force the common-law jurisdiction of the States' courts, even over torts committed at sea, and the State courts, in their decisions,

could and would follow their own notions about this field of law.

The reasoning and the holdings of *The Tungus, supra,* authorizes and, indeed, requires us to overrule the Appellants' points of error attacking the allowance of damages for mental anguish and damages by way of prejudgment interest, except as to future mental anguish. We conclude no prejudgment interest was awarded on future damages in the judgment. The judgment exceeds one million dollars.

We hold that the 60th Judicial District Court of Texas had jurisdiction and full authority to try the case, having jurisdiction and venue of the parties and the subject matter. Because of the locale of the injury and because of the lack of impact on general maritime commerce and navigation, inter alia; we decide that the governing, ultimate facts, as found by the trial bench, do not constitute a maritime tort. But, even if the facts, as found below, constituted a maritime tort, which we deny; nevertheless, the Texas District Court had full jurisdiction pursuant to Texas Wrongful Death Statute and the Texas Survival Statute. *Mobil Oil Corp. v. Higginbotham, supra,* and *Old Dominion Steamship Co. v. Gilmore, supra.*

28 U.S.C.A. Sec. 1333 (1966) specifically saves to the suitors in all cases all other remedies to which they are otherwise entitled. This saving to the suitors provision applies to any civil case that might otherwise be considered within the admiralty or maritime jurisdiction. Texas has provided other remedies under *TEX. CIV. PRAC. & REM. CODE ANN. Secs. 71.001 and 71.021* (Vernon 1986).

The Appellants' last point of error, VII, avers that the evidence is insufficient to support the findings of negligence and causation and the court's judgment based thereon and, as a subpoint, that the findings and judgment are so against the overwhelming weight and preponderance of the evidence as to be clearly wrong and unjust. We disagree. The above discussion overrules this point.

Appellants attack the trial bench's monetary award for loss of society, companionship and affection. They simply advance the contention that the amount of damages for this loss is excessive and against the great weight and preponderance of the evidence. They cite *Pope v. Moore,* 711 S.W.2d 622 (Tex. 1986), placing major reliance on *Pope v. Moore, supra.*

In *Pope, supra,* in a per curiam opinion by the Supreme Court, the court held that factual sufficiency is the sole remittitur standard for actual damages and in deciding whether the damages are excessive. Courts of appeal should employ the same test as for any other factually insufficient question. Courts of appeal must detail the relevant evidence, if any, requiring remittitur and when ordering a remittitur the appeals court shall clearly state why the fact finder's award is so factually insufficient or, on the other hand, so against the great weight and preponderance of the evidence as to be manifestly unjust.

Our court should be aware of the preachments in *Pool v. Ford Motor Co.,* 715 S.W.2d 629 (Tex. 1986), even in this bench-tried case. Pursuant to *Pope, supra,* and *Pool, supra,* upon an analysis of the evidence on this point, we cannot order a remittitur. The judgment below is affirmed.

AFFIRMED.

APPENDIX B

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

January 3, 1990

Mr. Michael C. Farrow
Clann, Bell & Murphy
1300 Post Oak Boulevard
Suite 2000
Houston TX 77056

Mr. Chris J. McGrath
Clann, Bell & Murphy
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Mr. Tommy L Yeates
Moore, Landrey, Garth & Jones
285 Liberty
Suite 1900
Beaumont TX 77701

RE: Case No. C-9222

STYLE: TEXACO REFINING & MARKETING INC.
and TEXACO MARINE SERVICES
v. ESTATE OF DAU VAN TRAN ET AL.

Dear Counsel:

Both applications for writ of error in the above referenced case were this day denied with the notation, Writ Denied.

Respectfully yours,

John T. Adams, Clerk

By /s/ BLANCA E. MORIN
Deputy

APPENDIX C

NO. B-127,026

IN THE DISTRICT COURT OF
JEFFERSON COUNTY, TEXAS
60TH JUDICIAL DISTRICT

ESTATE OF DAU VAN TRAN, ET AL.

vs.

TEXACO REFINING & MARKETING, INC., ET AL.

FINDINGS OF FACT
AND CONCLUSIONS OF LAW

I.

Findings of Fact

1. That on September 16, 1985 (the "date in question"), Texaco Refining & Marketing, Inc. and Texaco Marine Services, Inc. (hereinafter referred to as the "Texaco Defendants") were the owner and/or operator of the vessel in question, the "Texaco California".

2. That Dau Van Tran ("Dau") was a 25-year old Vietnamese, who was the oldest child of Vi Thi Pham (hereinafter referred to as "Pham") and Do Van Tran (hereinafter referred to as "Tran"), his mother and father, respectively.

3. That on the date in question, Dau was not married and had no children.

4. That on the date in question, Farmer Boy's Catfish Kitchens International, Inc. was the owner and operator

of Fisherman's Reef Dock in Sabine Pass, Jefferson County, Texas.

5. That on the date in question, Theresa Thi Nguyen and Anh Nguyen were the owners and/or operators of the fishing trawler "Miss Mary".

6. That on the date in question, Dau was not a crew member or employee of the "Miss Mary" and/or of Theresa Thi Nguyen and/or Anh Nguyen.

7. That on the date in question, Dau entered the water to remove a rope which had fouled the propeller of the "Miss Mary", while said vessel was moored at the Fisherman's Reef Dock in Sabine Pass, Texas.

8. That on the date in question, the Master of the "Texaco California" was Paul Kelley and the Sabine Pilot was Millard Scott.

9. That prior to the date in question, the Pilot, Millard Scott, had been involved in 3 previous accidents, hitting the Gulf Gate Bridge in 1987 and hitting 2 other vessels prior to that time, sinking at least 1 of said vessels.

10. That Plaintiffs' exhibits 6 through 13 were true and correct copies of various records pertaining to the "Texaco California" on the day in question, that were provided by the Texaco Defendants in response to discovery by Plaintiffs.

11. That Pilot Millard Scott went on board the "Texaco California" cn or about 1304 hours on the day in question.

12. That the "Texaco California" left the Texaco docks on or about 1324 hours on the day in question,

and that there were no other large vessels in the channel during the applicable time periods on the day in question.

13. That as the "Texaco California" was going down the channel towards Sabine Pass, it increased its speed to full ahead at Beacon 40 at 1413 hours.

14. That as the "Texaco California" continued on down the channel, it went past Beacon 38 at 1421 hours, at which point the vessel reduced its speed from full ahead to half speed.

15. That the "Texaco California" averaged 8.8 knots from Beacons 47 to 40, that said vessel averaged 11.3 knots from Beacon 40 to Beacon 38, and that said vessel averaged 9.75 knots from Beacon 38 to Beacon 32.

16. That from Beacon 47 through Beacon 32 is a distance of 7.3 miles, and that said vessel averaged approximately 9½ knots during said distance.

17. That Fisherman's Reef is approximately 0.5 to 0.6 miles from the channel in which the "Texaco California" was traveling.

18. That Fisherman's Reef docks are near or at Beacon 38.

19. That at the time the "Texaco California" came closest to Fisherman's Reef, it was traveling at least 11.3 knots, and in reasonable probability was traveling in excess of said speed.

20. That William Cooner, the Manager of the Sabine Pass Port Authority, observed a very large surge and wake between 2:00 p.m. and 2:30 p.m. on September 16, 1985, that in his opinion was caused by a large ship.

21. That Mr. Cooner described the surge and wake as the largest he has seen during his time at the Sabine Pass Port Authority, and that said wake came up on land 120 to 140 feet, causing 2 sandblasters who were working in the area to turn and flee from the wake.

22. That the "Texaco California" is approximately 715 feet long, 90 feet wide, and was drawing approximately 29 feet of water on the day in question.

23. That at 11.3 knots per hour, the "Texaco California" would displace approximately 1 million cubic feet of water per second.

24. That on the day in question, there was an approximate 15 knot per hour wind coming from the south, and a 2 foot high flood tide coming in.

25. That the "Texaco California" could have safely traveled half as fast as it actually did on the day in question, which would have eliminated the possibility of causing damage to divers and/or any other people who may have been in the water as the "Texaco California" passed.

26. That a ship such as the "Texaco California" is responsible for its wake and any damage caused thereby.

27. That the "Texaco California" was traveling at an excessive rate of speed on the day in question, causing an excessive surge of the "Miss Mary" at the Fisherman's wharf docks, which in turn caused the "Miss Mary" to crash against the dock in question, just as Dau was attempting to exit the water on the dock facilities, thereby crushing Dau between the "Miss Mary" and the dock.

28. That the "Texaco California" failed to keep a proper lookout on the day in question.

29. That the "Texaco California" failed to observe the rules of the road and the rules of good seamanship on the day in question.

30. That the Master of the "Texaco California" failed to control the speed of the Pilot on the day in question.

31. That the "Texaco California" failed to signal and/or to warn Dau that it was traveling at an excessive rate of speed on the day in question.

32. That each act described in Findings No. 27 through 31 constitute negligence.

33. That each act of negligence was a proximate cause of the death of Dau Van Tran.

34. That the conduct on the part of the "Texaco California" demonstrates an entire want of care, which raises the belief that the conduct complained of was the result of a conscious indifference to the rights or welfare of individuals such as Dau Van Tran.

35. That it was common knowledge up and down the Port Arthur Ship Channel that divers would from time to time be in the water working on vessels in various respects.

36. That because of said knowledge, it was essential that vessels such as the "Texaco California" travel at a slow rate of speed to avoid any possibility of injuring divers.

37. That the Master has the responsibility to control and direct the Pilot's conduct, including monitoring his speed, and reducing said speed if it is excessive, as it was in this situation.

38. That Farmer Boy's Catfish Kitchens International, Inc. did not commit any act of negligence.

39. That the decedent, Dau Van Tran, was negligent for attempting to get out of the water by climbing between the dock and shrimp boat.

40. That Dau, in the approximate 5 years prior to his death, contributed to his parents at the rate of approximately $1,000.00 a month.

41. That under Vietnamese custom, since Dau was the oldest son, he assumed leadership of the family unit, to include the mother, father and 9 siblings at the time in question.

42. That the decedent, Dau, would have continued to support his parents for the rest of their natural life expectancy, which in the case of the mother is 30.5 years and in the case of the father is 23.9 years.

43. That the parents shared a very close relationship with their son, Dau, and because of the negligence of the Texaco Defendants, said parents have been deprived of the companionship, affection and society of their son, Dau, both from the time of his death up through the time of trial, and for the rest of their natural lives.

44. That the parents have suffered severe mental anguish and sorrow as a result of the unfortunate and untimely death of their son, Dau, both from the time of the incident made the basis of the suit through the time of trial, and for the rest of the natural lives of the parents.

45. That the decedent, Dau, was conscious for at least 40 minutes after the incident in question occurred.

46. That the decedent, Dau, sustained excruciating pain and suffering and mental anguish during said 40 minute period.

47. That the decedent, Dau, incurred necessary medical expenses as a result of the negligence of the Texaco Defendants.

48. That the parents have incurred necessary and reasonable funeral and burial expenses as a result of the death of their son, Dau.

49. That the Texaco Defendants were not grossly negligent.

50. That to fairly compensate the Plaintiffs for the various elements of damages that they have suffered, the Court finds that the Plaintiff, Pham, should be awarded the sum of $250,000.00 for the mental anguish she has suffered from the time of the incident until the time of trial, $125,000.00 for the mental anguish that she will in reasonable probability suffer for the rest of her life because of the death of her son, Dau, $250,000.00 for the loss of companionship, affection and society for the time period from the date of the incident until the time of trial, and $125,000.00 for the loss of companionship, affection and society that she in reasonable probability will suffer for the rest of her natural life.

51. The Court finds that the father, Do Van Tran, should recover $125,000.00 for the mental anguish he has suffered from the time of the incident until the time of trial, $75,000.00 for the mental anguish that he in reasonable probability will suffer for the rest of his life because of the death of his son, Dau, $125,000.00 for the loss of companionship, affection and society for the

time period from the date of the incident until the time of trial, and $75,000.00 for the loss of companionship, affection and society that he in reasonable probability will suffer for the rest of his natural life.

52. That under the Survivorship Statute, the Court finds that the sum of $40,000.00 would be fair and reasonable to compensate the decedent for the conscious pain and suffering and mental anguish he endured during the 40 minute period he was conscious immediately after the crushing injury he received on the day in question.

53. That under the Survivorship Statute, the sum of $1,849.55 should be recovered for the reasonable and necessary medical expenses incurred on behalf of Dau, and the sum of $3,000.00 should be recovered which represents the reasonable and necessary funeral and burial expenses incurred.

54. That the parents have sustained damages in the sum of $30,000.00 for the pecuniary loss they have suffered from the time of the incident through the date of trial because of the death of their son.

55. That the sum of $100,000.00 would fairly and reasonably compensate the parents for the pecuniary loss that they in reasonable probability will suffer in the future for the wrongful death of their son, Dau.

56. That the decedent was 15% at fault and the Texaco defendants were 85% at fault.

57. That the Texaco defendants are entitled to a credit of $22,500.00 for the amount paid in settlement by Anh Nguyen and Theresa Nguyen.

II.

Conclusions of Law

1. That because of the negligence of the Texaco Defendants in various respects, each of which was a proximate cause of the Plaintiffs' damages, the Plaintiffs should recover from Texaco Refining & Marketing, Inc. and Texaco Marine Services, Inc., jointly and severally, the sum of $1,324,849.55 as actual damages, less $198,727.43, (which is the amount to be deducted for the 15% contributory negligence of the decedent) and also less $22,500.00 (the amount of settlement funds paid by AHN NGUYEN and THERESA NGUYEN to the Plaintiffs), which leaves a net recovery of $1,103,622.12.

2. That the Plaintiffs should take nothing of and from the Defendant, Farmer Boy's Catfish Kitchens International, Inc.

3. That the Texaco Defendants, Texaco Refining & Marketing, Inc. and Texaco Marine Services, Inc., should have and recover of and from Farmer Boy's Catfish Kitchens International, Inc., nothing.

4. That the Third-Party Plaintiffs, Texaco Refining & Marketing, Inc. and Texaco Marine Services, Inc., should have and recover of and from the Third-Party Defendants, Theresa Nguyen and Anh Nguyen, nothing.

5. That the Plaintiffs should be entitled to recover pre-Judgment interest on all elements of damages that have accrued from a time period 6 months after the incident in question up through the date Judgment is entered, which is the sum of $209,489.18.

6. That the Plaintiffs are entitled to recover post-Judgment interest at the rate allowed by law.

SIGNED this the 28th day of September, 1988.

/s/ GARY SANDERSON
Judge Presiding

APPENDIX D

NO. B-127,026

IN THE DISTRICT COURT OF
JEFFERSON COUNTY, TEXAS
60TH JUDICIAL DISTRICT

ESTATE OF DAU VAN TRAN, ET AL.

vs.

TEXACO REFINING & MARKETING, INC., ET AL.

FINAL JUDGMENT

BE IT REMEMBERED that on the 19th day of September, 1988, came on to be heard the above styled and numbered cause, and the Plaintiffs appeared in person and by and through their attorneys of record, and the Defendants appeared by and through their attorneys of record, and all parties announced to the Court that they agreed to try the case non-jury, and the Court proceeded to hear the evidence and argument of counsel, is of the opinion that the Plaintiffs should have and recover of and from TEXACO REFINING & MARKETING, INC. and TEXACO MARINE SERVICES, INC., jointly and severally, the sum of ONE MILLION ONE HUNDRED THREE THOUSAND SIX HUNDRED TWENTY TWO AND 12/100 DOLLARS ($1,103,622.12), that Plaintiffs should take nothing of and from the Defendant, FARMER BOY'S CATFISH KITCHENS INTERNATIONAL, INC., that TEXACO REFINING & MARKETING, INC. and TEXACO MARINE SERVICES, INC., should have and recover of and from FARMER BOY'S CATFISH KITCHENS INTERNATIONAL, INC.,

nothing, that the Third-Party Plaintiffs, TEXACO REFINING & MARKETING, INC. and TEXACO MARINE SERVICES, INC., should have and recover of and from the Third-Party Defendants, THERESA NGUYEN and ANH NGUYEN, nothing, that the Plaintiffs should be entitled to recover pre-Judgment interest on all elements of damages that have accrued from a time period six (6) months after the incident in question up through the date Judgment is entered, which is the sum of TWO HUNDRED NINE THOUSAND FOUR HUNDRED EIGHTY NINE AND 18/100 DOLLARS ($209,489.18), and that the Plaintiffs are entitled to recover post-Judgment interest at the rate allowed by law. It is, therefore,

ORDERED, ADJUDGED and DECREED that Plaintiffs DO VAN TRAN and VI THI PHAM recover of and from the Defendants, TEXACO REFINING & MARKETING, INC. and TEXACO MARINE SERVICES, INC., jointly and severally, the sum of ONE MILLION THREE HUNDRED THIRTEEN THOUSAND ONE HUNDRED ELEVEN AND 30/100 DOLLARS ($1,313,111.30).

It is further ORDERED, ADJUDGED and DECREED that Plaintiffs take nothing of and from the Defendant, FARMER BOY'S CATFISH KITCHENS INTERNATIONAL, INC.

It is further ORDERED, ADJUDGED and DECRRED that Defendants TEXACO REFINING & MARKETING, INC. and TEXACO MARINE SERVICES, INC., should have and recover of and from FARMER BOY'S CATFISH KITCHENS INTERNATIONAL, INC., nothing.

It is further ORDERED, ADJUDGED and DECREED that Third-Party Plaintiffs, TEXACO REFINING & MARKETING, INC. and TEXACO MARINE SERVICES, INC., should have and recover of and from the Third-Party Defendants, THERESA NGUYEN and ANH NGUYEN, nothing. The above sum shall draw interest at the legal rate from date of Judgment until paid. All other relief not expressly granted herein is denied.

SIGNED this the 28th day of September, 1988.

/s/ GARY SANDERSON
Judge Presiding

APPENDIX E

COURT OF APPEALS
NINTH DISTRICT OF STATE OF TEXAS
1001 PEARL, SUITE 330
BEAUMONT, TEXAS 77701
Phone 409 835-8402
SHIRLEY FORREST, CLERK

September 27, 1989

Michael C. Farrow
Clann, Bell & Murphy
20th Floor, Allied Bank Tower
1300 Post Oak Boulevard
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Jon B. Burmeister
Moore, Landry, Garth & Jones
285 Liberty, Suite 1900
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P.O. Box 3947
381 Broadway
Beaumont, TX 77704

Louis H. Beard
Wells, Peyton, Beard, Greenberg, Hunt
P.O. Box 3708
Beaumont, TX 77704

RE: CASE NO. 09-89-00009-CV

TRIAL COURT CASE NO. B-127,026

STYLE: Texaco Refining & Marketing, Inc. and
Texaco Marine Services
V: Estate of Dau Van Tran, et al

The Appellant's Motion for Rehearing in the above styled and numbered cause was overruled this date.

Respectfully yours,

SHIRLEY FORREST, CLERK

APPENDIX F

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

February 7, 1990

Mr. Michael C. Farrow
Clann, Bell & Murphy
1300 Post Oak Boulevard
Suite 2000
Houston TX 77056

Mr. Chris J. McGrath
Clann, Bell & Murphy
2000 First Interstate Tower
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Mr. Jon B. Burmeister
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Mr. Steven C. Barkley
Lindsay, Moses & Barkley
P. O. Box 3947
Beaumont TX 77704

Mr. Tommy L. Yeates
Moore, Landrey, Garth & Jones
285 Liberty
Suite 1900
Beaumont TX 77701

RE: Case No. C-9222

STYLE: TEXACO REFINING & MARKETING INC.
and TEXACO MARINE SERVICES
v. ESTATE OF DAU VAN TRAN ET AL.

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Respectfully yours,

John T. Adams, Clerk

By /s/ COURTLAND CROCKER
Deputy

APPENDIX G

NO. B-127,026

IN THE DISTRICT COURT OF
JEFFERSON COUNTY, TEXAS
60TH JUDICIAL DISTRICT

ESTATE OF DAU VAN TRAN, ET AL.

vs.

TEXACO REFINING & MARKETING, INC., ET AL

PLAINTIFFS' THIRD AMENDED
ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, ESTATE OF DAU VAN TRAN, by and through its administratrix, VI THI PHAM, and DO VAN TRAN and VI THI PHAM, INDIVIDUALLY, hereinafter referred to as Plaintiffs, complaining of TEXACO REFINING & MARKETING, INC., TEXACO MARINE SERVICES, INC., (hereinafter referred to as the "TEXACO" Defendants) and FARMER BOY'S CATFISH KITCHENS INTERNATIONAL, INC., Defendants herein, and for cause of action would respectfully show unto the Court the following:

I.

All parties are properly before the Court.

II.

On or about September 16, 1985, the Decedent, DAU VAN TRAN, was employed by Theresa Thi Nguyen and

Anh Nguyen, as the operators of the fishing trawler MISS MARY, Official No. 544790. Plaintiffs allege that on said date, the Decedent was instructed by his employers to enter the water and remove a rope which had fouled the propeller of a fishing trawler, while the vessel was moored at the Fisherman's Reef Barge Dock, Sabine Pass, Jefferson County, Texas. Plaintiffs allege further that while the Decedent was working in said water, a vessel owned and/or operated by the Defendants TEXACO MARINE SERVICES, INC. and/or TEXACO REFINING & MARKETING, INC. passed, causing the vessel that Decedent was working on to surge, resulting in DAU VAN TRAN sustaining fatal injuries when he was crushed between the vessel and the Fisherman's Reef Barge Dock.

III.

Plaintiffs would show that the TEXACO Defendants are liable to Plaintiffs under a theory of negligence and negligence per se which negligence was a proximate cause of the Decedent's injuries and subsequent death. More specifically, the TEXACO Defendants, acting by and through their various agents, employees, and/or representatives, were negligent and negligent per se to include the following: traveling past the Fisherman's Reef Barge Dock at too great a speed; in passing the Fisherman's Reef Barge Dock too closely; in failing to keep a proper lookout; in failing to properly supervise and/or control the pilot of the vessel; and in failing to signal and/or warn Decedent of the impending surge; and, in exceeding the speed limit of the Sabine Ship Channel. Moreover, Plaintiffs' allege that Defendants violated Article 29 of the Inland Rules, by failing to practice good seamanship.

In addition, Plaintiffs allege that the TEXACO Defendants are strictly liable to the Plaintiffs for the wake and/or surge of its vessel, and that the Plaintiffs should be allowed to recover under that theory as well. Plaintiffs allege that each act specified above is a proximate cause or producing cause of Plaintiffs damages.

IV.

On the occasion made the basis of this suit, Defendant, FARMER BOY'S CATFISH KITCHENS INTERNANATIONAL, INC., was the owner and occupier of the dock at which the incident forming the basis of this suit occurred and the owner of the "Miss Mary". DAU VAN TRAN, Decedent, was an invitee of the Defendant, FARMER BOY'S CATFISH KITCHENS INTERNATIONAL, INC. at the time of said incident. Plaintiffs allege that Defendant FARMER BOY'S CATFISH KITCHENS INTERNATIONAL, INC. was negligent in failing to provide a safe place to work, as well as various other acts and/or omissions of negligence and negligence per se which Plaintiffs may prove at the time of trial. Said negligence was a proximate cause of Plaintiffs' damages herein. In addition, Plaintiffs allege that the Decedent was a Jones Act seaman, and is entitled to recover not only for a violation of the Jones Act but also under general maritime law.

V.

Plaintiffs, DO VAN TRAN, et ux, VI THI PHAM, are the surviving parents and beneficiaries of DAU VAN TRAN, Deceased, and would show that they seek to recover those elements of damage for the death of their son pursuant to Section 71.002 *et seq.* and Section 71.021

et seq. of the Texas Civil Practice & Remedies Code. In connection therewith, Plaintiffs allege that the Deceased was never married, and had no children at the time of his death, and as the surviving parents are entitled to assert this cause of action. Plaintiffs allege that they are entitled to recover damages for all the various catagories of damage under the above referenced provisions in excess of the minimum jurisdictional requirements of this Honorable Court for which amount they now sue.

VI.

Plaintiffs would show that DAU VAN TRAN, Deceased, prior to his death, did provide many valuable services which had a pecuniary value and that had he lived, he would have continued to provide said services, as well as other services, and would have made various economic contributions to Plaintiffs from earnings which he made, and in all probability would have earned if he had lived. Plaintiffs would further show that they shared a very close relationship with their son and that as a result of the carelessness and negligence of the Defendants, they have been deprived of the companionship, affection and society of their son. Plaintiffs seek damages of and from the Defendants for the loss of companionship, affection and society of their deceased son. Plaintiffs would further show that they were caused to suffer severe mental anguish and sorrow as a result of the unfortunate and untimely death of their son, DAU VAN TRAN, Deceased, which death resulted from the negligence of the Defendants as herein alleged. Plaintiffs seek damages of and from the Defendants for their extreme mental anguish, both past and future, which has been a direct and proximate result of the negligence and carelessness of the Defendants.

VII.

As a result of the injuries and subsequent death of DAU VAN TRAN, Deceased, Plaintiffs have incurred necessary medical expenses, of which Plaintiffs seek recovery. In addition, as a result of the negligence of the Defendants, and the injuries and subsequent death to Plaintiff, DAU VAN TRAN, Deceased, caused solely by the negligence of the Defendants, Decedent experienced extreme physical pain, suffering, and mental anguish, of which Plaintiffs seek recovery herein.

VIII.

Plaintiffs would further show that they have incurred necessary funeral and burial expenses as a result of the death of their son, DAU VAN TRAN, Deceased, of which Plaintiffs seek recovery.

IX.

Plaintiffs further allege a cause of action against Defendants for gross negligence. Plaintiffs allege that the conduct on the part of the Defendants show an entire want of care, and that the Plaintiffs should be allowed to recover punitive damages in a sum which far exceeds the minimum jurisdictional limits of this Court.

X.

Plaintiffs further sue for both their pre-judgment and post-judgment interest thereon at the maximum extent allowed by law.

XI.

Plaintiffs hereby demand a trial by jury.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray that upon final hearing hereof, Plaintiffs have judgment of and from the Defendants for actual damages and punitive damages in an amount which far exceeds the minimum jurisdictional requirements of this Court, costs of Court, pre-judgment and post-judgment interest thereon at the highest rate allowed by law, and for such other and further relief, at law or in equity, to which Plaintiffs may be justly entitled to receive.

Respectfully submitted,

MOORE, LANDREY, GARTH
& JONES

By: /s/ TOMMY L. YEATES
Tommy L. Yeates
TBA #22151100
Jon B. Burmeister
TBA #03425500
285 Liberty, Suite 1900
Beaumont, Texas 77701
(409) 835-3891

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Plaintiffs' Third Amended Original Petition has been mailed, certified, return receipt requested, to Mr. Michael C. Farrow, CLANN, BELL & MURPHY, 20th Floor, Allied Bank Tower, 1300 Post Oak Boulevard, Houston, Texas 77056, Mr. Peter A. McLauchlan, CLANN, BELL & MURPHY, 20th Floor, Allied Bank Tower, 1300 Post Oak Boulevard, Houston, Texas 77056, and to Mr. Steven C. Barkley, EVANS, MOSES & BARKLEY, 398 Pearl Street, Beaumont, Texas 77701, on this the 15th day of August, 1988.

/s/ TOMMY L. YEATES
Tommy L. Yeates

APPENDIX H

NO. B-127,026

IN THE DISTRICT COURT OF
JEFFERSON COUNTY, TEXAS
60TH JUDICIAL DISTRICT

ESTATE OF DAU VAN TRAN, ET AL

vs.

TEXACO REFINING & MARKETING INC., ET AL

DEFENDANTS' MOTION FOR NEW TRIAL OR, IN THE ALTERATIVE, TO MODIFY, CORRECT OR REFORM THE JUDGMENT OR, IN THE ALTERNATIVE, FOR REMITTITUR

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW Texaco Refining & Marketing Inc. and Texaco Marine Services Inc., Defendants herein, and respectfully move that the Court grant a new trial or, in the alternative, the Court modify, correct or reform the judgment or, in the alternative, move for a remittitur in the above-styled case. As grounds therefor, the following are submitted:

1. There is no evidence of record to support the finding of the Court and judgment thereon relative to the issue of negligence on the part of the Defendants.
2. The evidence of record is insufficient to support the finding of the Court and judgment thereon relative to the issue of negligence on the part of

the Defendants in that the finding and judgment are so contrary to the overwhelming weight of all the evidence as to be manifestly unjust or wrong.

3. There is no evidence of record to support the finding of the Court and judgment thereon relative to the issue of proximate causation on the part of the Defendants.

4. The evidence of record is insufficient to support the finding of the Court and judgment thereon relative to the issue of proximate causation on the part of the Defendants in that the finding and judgment are so contrary to the overwhelming weight of all the evidence as to be manifestly unjust or wrong.

5. The amount of damages awarded by the judgment is excessive, is supported by factually insufficient evidence and constitutes an abuse of discretion.

6. No or insufficient evidence supports the Court's findings and judgment thereon relative to the specific damages of mental anguish, loss of companionship, affection and society, and conscious pain, suffering and mental anguish.

7. Damages for mental anguish have been improperly included in the judgment inasmuch as such are not awardable under the legal principles which obtain herein.

8. The Court erred in sustaining the Plaintiffs' objection to the introduction of the testimony of Dan Gilbert.

9. The Court erred in sustaining the Plaintiffs' objection to the introduction of the testimony of Mitchell Horne.

10. The Court erred in admitting into evidence all exhibits represented to be documents provided

pursuant to requests for production inasmuch as no evidentiary foundation was established for any of such exhibits.

11. The Court erred in admitting into evidence discovery responses of the Defendants in a separate action.

Respectfully submitted,

CLANN, BELL & MURPHY

/s/ MICHAEL C. FARROW
Michael C. Farrow
TBA #060847750
Twentieth Floor
1300 Post Oak Boulevard
Houston, Texas 77056
(713) 871-0333

Attorneys for Defendants
Texaco Marine Services Inc. and
Texaco Refining & Marketing Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Defendant's Motion for New Trial or, in the Alternative, to Modify, Correct or Reform the Judgment or, in the Alternative, for Remittitur was sent to all opposing counsel by certified mail, return receipt requested on this 27th day of October, 1988.

/s/ MICHAEL C. FARROW
Michael C. Farrow

APPENDIX I

NO. B-127,026

IN THE DISTRICT COURT OF
JEFFERSON COUNTY, TEXAS
60TH JUDICIAL DISTRICT

ESTATE OF DAU VAN TRAN, ET AL

vs.

TEXACO REFINING & MARKETING INC., ET AL

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR NEW TRIAL OR, IN THE ALTERNATIVE, TO MODIFY, CORRECT OR REFORM THE JUDGMENT OR, IN THE ALTERNATIVE, FOR REMITTITUR

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW Texaco Refining & Marketing Inc. and Texaco Marine Services Inc., Defendants herein, and respectfully submit the following memorandum on law in support of Point 7 set forth in their Motion for New Trial or, in the Alternative, to Modify, Correct or Reform the Judgment or, in the Alternative, for Remittitur.

On the 28th day of September 1988, this Court entered its findings of facts, conclusions of law and final judgment in the above styled case. The Court found, *inter alia*:

1. That on September 16, 1985, Texaco Refining & Marketing Inc. and Texaco Marine Services Inc. (hereinafter referred to as the "Texaco Defendants") were the

owner and/or operator of the vessel "TEXACO CALIFORNIA", (Findings of Fact, paragraph 1).

2. That Dau Van Tran ("Dau") was a 25 year old Vietnamese, who was the oldest child of Vi Thi Pham ("Pham") and Do Van Tran ("Tran") his mother and father respectively. (Findings of Facts, paragraph 2).

3. That on the date in question, Dau entered the water to remove a rope which had fouled the propeller of the "MISS MARY", while said vessel was moored at the Fisherman's Reef Dock in Sabine Pass, Texas. (Findings of Fact, paragraph 7)

4. That the "TEXACO CALIFORNIA" was traveling at an excessive rate of speed on the day in question, causing an excessive surge of the "MISS MARY" at the Fisherman's wharf docks, which in turn, caused the "MISS MARY" to crash against the dock just as Dau was attempting to exit the water on the dock facilities, thereby crushing Dau between the "MISS MARY" and the dock. (Findings of Fact, paragraph 27)

5. That the "TEXACO CALIFORNIA" failed to keep a proper lookout on the day in question. (Findings of Fact, paragraph 28)

6. That the "TEXACO CALIFORNIA" failed to observe the rules of the road and rules of good seamanship on the day in question. (Findings of Fact, paragraph 29)

7. That the Master of the "TEXACO CALIFORNIA" failed to control the speed of the pilot on the day in question. (Findings of Fact, paragraph 30)

8. That the "TEXACO CALIFORNIA" failed to signal and/or to warn Dau that it was traveling at an

excessive rate of speed on the day in question. (Findings of Fact, paragraph 31)

9. That each act described in Findings No. 27 through 31 constitute negligence. (Findings of Fact, paragraph 32)

10. That plaintiff Pham should be awarded $250,000.00 for the mental anguish she has suffered from the time of the incident until the time of the trial, $125,000.00 for the mental anguish that she will, in reasonable probability, suffer for the rest of her life because of the death of her son Dau. (Findings of Fact, paragraph 50)

11. That plaintiff Tran should recover $125,000.00 for the mental anguish he has suffered from the time of the incident until the time of trial, $75,000.00 for the mental anguish that he, in reasonable probability, will suffer for the rest of this life because of the death of his son Dau. (Findings of Fact, paragraph 51)

THE CLAIMS IN THIS CASE ARE WITHIN ADMIRALTY JURISDICTION AND THUS ARE GOVERNED BY SUBSTANTIVE MARITIME LAW

A tort claim comes within Admiralty jurisdiction of federal courts when the alleged wrong occurs on navigable waters within the United States and bears a significant relationship to a traditional maritime activity. *East River S.S. Corp. v. Transamerica Delaval,* 106 S.Ct. 2295, 2298 (1986); *Executive Jet Aviation Incorporation v. City of Cleveland,* 409 U.S. 249 (1972). Based upon the Court's findings of facts there is no doubt that admiralty jurisdiction exists over this case. The locality of the alleged wrong was in navigable waters and, as in *Kermarec Compagnie Generale Transatlantique,* 358 U.S. 625

(1959), there is an allegation of negligence concerning the navigation and/or operation of a vessel on navigable waters.

The Supreme Court in *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674 (1982) recognized, "[b]ecause the 'wrong' here involves the negligent operation of a vessel on navigable waters, we believe that it has a sufficient nexus to traditional maritime activity to sustain admiralty jurisdiction in the [federal] District Court" just as this Court must.

With admiralty jurisdiction comes the application of substantive maritime law. *East River S.S. Corp. v. Transamerica Delaval*, 106 S.Ct. at 2299, *Executive Jet Aviation*, 409 U.S. at 255. Absent a relevant federal statute, the general maritime law, as developed by the judiciary, applies. *East River S.S. Corp.*, 106 S.Ct. at 2299, citing *United States v. Reliable Transfer Company*, 421 U.S. 397 (1975) and *Knickerbocker Ice Company v. Stewart*, 253 U.S. 149 (1920).

Although the "savings to suitors" clause, 28 U.S.C. § 1333, leaves state courts competent to adjudicate maritime causes of action in proceedings *in personam* to enforce rights granted in the general maritime law, a state court is free to act under that "savings" clause only "so long as it does not attempt to make changes in the 'substantive maritime law.'" *Madruga v. Superior Court*, 346 U.S. 556, 561 (1954). As the Supreme Court has observed, "in such cases the extent to which state law may be used to remedy maritime injuries is constrained by the so-called 'reverse-Erie' doctrine which requires that the substantive remedies afforded by the States conform to governing federal maritime standards." *Offshore Logistics, Inc. v. Tallentire*, 106 S.Ct. 2485, 2495 (1986).

In other words, the "savings" clause does no more than preserve the right of maritime suitors to pursue remedies in a state forum which is then required to apply general maritime law. It does not empower a state court exercising concurrent jurisdiction to redefine the requirements or limits of a remedy available at admiralty.

The Supreme Court laid the foundation of this doctrine in a series of cases commencing over 100 years ago. *See The Lottawana,* 21 Wall. 558, 575, 22 L.Ed. 654 (1875) (it is a constitutionally based principle that federal admiralty law should be a "system of law coextensive with, and operating uniformly in the whole country."); *Southern Pacific Co. v. Jensen,* 244 U.S. 205 (1917)., *Chelentis v. Luckenback S.S. Co.,* 247 U.S. 372 (1918)., *Knickerbocker Ice Co. v. Stewart,* 253 U.S. 149 (1920). This principle was recently recognized by the Fifth Circuit in *Powell v. Offshore Navigation, Inc.,* 644 F.2d 1063, 1065 n.5, (5th Cir. 1981), *cert. denied* 454 U.S. 972 (1981) ("state law may not conflict with federal maritime law as it would be redefining the requirements or limits of a remedy available at admiralty") (citations omitted).

MENTAL ANGUISH AND GRIEF ARE NOT RECOVERABLE AS DAMAGES IN A GENERAL MARITIME WRONGFUL DEATH ACTION

In *Moragne v. States Marine Liens, Inc.,* 398 U.S. 375 (1979), the Court, after lengthy review of maritime jurisprudence, overruled a long-recognized principle and specifically recognized a maritime wrongful death cause of action. Left for later determination was a crafting of the elements of damage within this remedy. Subsequently,

in *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974), the Court specifically held that mental anguish or grief is *not* a compensable element. This was reaffirmed in *Offshore Logistics, Inc. v. Tallentine*, 106 S.Ct. 2485 (1986).

THE GENERAL MARITIME WRONGFUL DEATH ACTION PREEMPTS STATE WRONGFUL DEATH ACTS

One of the first courts to hold that the *Moragne* general maritime law cause of action for wrongful death preempts the application of state wrongful death acts was *Petition of United States Steel Corporation*, 436 F.2d 1256 (6th Cir. 1970). The case involved a collision between two vessels in Michigan territorial waters. Several seamen, employed by United States Steel, were killed when the vessels collided. Their beneficiaries asserted negligence claims against the other vessel which could not be based upon the Jones Act because of the lack of an employer-employee relationship. The decedents' survivors argued that their measure of damages should be reckoned under the Michigan Wrongful Death statute. However, the court held that the entire proceeding against this non-employer for the wrongful deaths of the seamen caused by the negligence of that non-employer were governed by principles of maritime law.

The court necessarily examined the history and development of the wrongful death body of law in maritime tort actions. It had been held in *The Harrisburg*, 119 U.S. 199 (1886) that absent a statutory right, there could be no recovery by the next-of-kin of a decedent killed as a result of a maritime tort. However, a judicial

exception was created to the rule of *The Harrisburg* for maritime torts resulting in death that occurred in the territorial waters of a state that statutorily permitted recovery for wrongful death. *See, Western Fuel Company v. Garcia*, 42 S.Ct. 89 (1921); *The Hamilton*, 207 U.S. 398 (1907). The *U.S. Steel* Court noted that the *Moragne* decision, in overruling *The Harrisburg* and providing a wrongful death remedy under maritime law, eliminated the need for both the *Western Fuel* exception to the rule and for tests designed to implement that exception. The Court held that all facets of the maritime law wrongful death recovery, including the measure of damages, were to be governed by the principles of maritime law. The Court reasoned that recognition of a right to recovery for wrongful death under general maritime law strongly dictated that in order to promote uniformity and supremacy of the maritime law that the measure of recovery must be governed by the principles of the general maritime law, where as in the *U.S. Steel* case, there was a conflict between the damages recoverable under the general maritime law and those recoverable under state law. *See also, Hornsby v. Fish Meal Co.*, 431 F.2d 865, 867 (5th Cir. 1970) (actions for wrongful death of two pilots killed in mid-air collision within one marine league of the Louisiana shore is governed by *Moragne* cause of action that is not dependent on adjacent state law.) Similarly, the court in *Matter of S/S Helena*, 529 F.2d 744 (5th Cir. 1976), held that the wrongful death remedy provided by *Moragne* precludes recognition in admiralty of state wrongful death statutes. Therefore, the general maritime law rather than the Louisiana wrongful death statute governed the right of recovery for wrongful death of seventeen seamen were killed in a collision between a

freighter and a U.S. Coast Guard vessel in Louisiana territorial waters.

The court justified its holding on two grounds. Firstly, the court stated that after *Moragne* there was no void in the general maritime law regarding wrongful death actions because *The Harrisburg* had been overruled. Therefore, there was no need to refer to state wrongful death statutes. *S/S Helena*, 529 F.2d at 752. Secondly, the other justification for the application of state wrongful death statutes in the pre-*Moragne* scheme was because of a special solicitude regarding state sovereignty in territorial waters. The *S/S Helena* court noted that the *Moragne* decision, by creating an expansive cause of action for sea-orientated deaths, whether caused by negligence or unseaworthiness, significantly interfered with the state's scheme for wrongful death recoveries and therefore was not "solicitous" with respect to state sovereignty. *Id.* at 752. The court therefore reasoned that the rationale implicit in *Moragne* for the many years of federal recognition of state statutes was that this recognition provided a remedy for breaches of federally imposed duties of the sea that resulted in death that were not compensable under the general maritime law due to *The Harrisburg* rule. The court observed, "Now that *The Harrisburg* has been overturned and a general maritime law remedy for wrongful death has been created, there is no longer a need for recognition and enforcement of state wrongful death statutes in the admiralty court." *Id.* at 753.

The *S/S Helena* ruling that state wrongful death actions have been supplanted by the *Moragne* general maritime law wrongful death action has been cited as an absolute proposition in several cases. *See e.g., Lemon v. Bank*

Lines, Ltd., 411 F.Supp. 677, 679 (S.D. Ga. 1976), affirmed without published opinion 562 F.2d 1259; *Sistrunk v. Circle Bar Drilling Company*, 770 F.2d 455, 456-457 (5th Cir. 1985), *rehearing en banc denied*, 775 F.2d 301 (5th Cir. 1985), *cert. denied* 475 U.S. 1019 (1986), *Trueheart v. Blandon*, 672 F. Supp. 929, 935 (E.D. La. 1987); *Nelson v. United States*, 639 F.2d 469 (9th Cir. 1980); *Evich v. Morris*, 819 F.2d 256, 257-258 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 261 (1987).

However, even in the unlikely event this Court is not convinced by the wealth of precedent that the *Moragne-Gaudet* decisions preclude the application of state wrongful death statutes, the underlying policies of the *Moragne* general maritime law cause of action require that same result.

The *Moragne-Gaudet* line of cases has two aims. The first is to achieve uniformity in the exercise of admiralty jurisdiction and the second is to provide special solicitude to seamen. *See Moragne*, 398 U.S. 375, 385-389 and *Gaudet*, 414 U.S. 573, 578. With regard to the first aim of achieving uniformity in the exercise of admiralty jurisdiction, if state wrongful death statutes were permitted to operate and provide for the recovery of damages based on mental grief or anguish this would conflict with all federal maritime schemes of recovery. The Jones Act, 46 U.S.C. § 668, does not provide for non-pecuniary recovery nor does the Death on the High Seas Act, 46 U.S.C. § 761, 762. As noted, the *Gaudet* remedy itself does not allow for the recovery of damages for mental anguish or grief. *See, Gaudet*, 414 U.S. 573, 585 n. 17 ("Loss of society must not be confused with mental anguish or grief, which is not compensable under the maritime wrongful-death remedy. . . .")

The second aim of providing special solicitude to seamen would rarely be served. Granted, the dependents of a seaman who is killed in territorial waters due to the negligence of a non-employer would be able to recover non-pecuniary damages for loss of grief or anguish if the state's statute permitted. However, the instances in which this would occur would be less frequent than those in which a non-seaman was able to recover these damages supplied by state statute since a seaman is confined to his Death on the High Seas Act, Jones Act or general maritime law unseaworthiness actions in most cases. If recovery for mental anguish was permitted it would create a curious anomaly. Only when a seaman, in state territorial waters, was killed due to the negligence of a non-employer would his survivors be able to recover damages for their mental anguish. In all other situations, the Jones Act, Death on the High Seas Act or *Moragne-Gaudet* causes of action would prohibit the recovery of mental anguish non-pecuniary damages.

Finally, another principle that guided the Supreme Court in *Moragne* and *Gaudet,* was that although they were creating a new cause of action, the Court would look to general law, including state wrongful death actions, only where there was no analogous maritime law. *Moragne,* 398 U.S. at 387-93, 404-09; *Gaudet,* 414 U.S. at 578, 583-588. This is merely an application of the "reverse-*Erie*" doctrine which requires that substantive remedies afforded by the States conform to governing federal maritime standards. Therefore, in the unlikely event that this Court finds that *Moragne* does not in and of itself preclude state wrongful death statutes from supplying ~~a remedy~~ in state territorial waters for wrongful death, the state remedy must nonetheless be confined to

the analogous maritime law remedies provided by *Gaudet*. In *Gaudet*, 414 U.S. 573 at 585, the court in footnote 17 noted that the great majority of jurisdictions including several which do allow damages for non-pecuniary loss hold that grief, bereavement, anxiety, distress or mental pain or suffering of the beneficiaries may not be regarded as elements of damage in a wrongful death action. In this regard, *Sanchez v. Schindler*, 651 S.W.2d 249 (Tex. 1983) the case that changed the scope of recovery for the Texas Wrongful Death Act by permitting recovery of damages for mental anguish or bereavement by the parents of a minor child, the court noted there were few jurisdictions that shared its view allowing recovery by parents for mental anguish and even fewer that permitted parents who did not witness the events causing their child's death to recover for their mental anguish. Therefore, the potential for creating inconsistencies rather than uniformity when maritime jurisdiction exists is even greater since the scope of recovery will vary from state to state if the maritime remedy is not recognized and applied.

Respectfully submitted,

CLANN, BELL & MURPHY

/s/ MICHAEL C. FARROW
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1300 Post Oak Boulevard,
20th Floor
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(713) 871-0333

Attorneys for Defendants,
Texaco Marine Services Inc. and
Texaco Refining & Marketing Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Defendants' Memorandum in Support of its Motion for New Trial, or, in the Alternative, to Modify, Correct or Reform the Judgment or, in the Alternative, for Remittitur was forwarded to all opposing counsel by Federal Express, properly addressed as follows:

Mr. Steven C. Barkley
EVANS, MOSES & BARKLEY
815 Goodhue Building
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Federal Express AirBill No. 9162015052

Mr. Jon B. Burmeister
MOORE, LANDREY, GARTH & JONES
Liberty-Pearl Complex
285 Liberty, Suite 1900
Beaumont, Texas 77701
Federal Express AirBill No. 9162015111

on this 3rd day of November, 1988.

/s/ MICHAEL C. FARROW
Michael C. Farrow

APPENDIX J

NO. B-127,026

IN THE DISTRICT COURT OF
JEFFERSON COUNTY, TEXAS
60TH JUDICIAL DISTRICT

ESTATE OF DAU VAN TRAN, ET AL

vs.

TEXACO REFINING & MARKETING, INC., ET AL

Defendants' Supplemental Memorandum in Support of Their Motion for New Trial or, in the Alternative, to Modify, Correct or Reform the Judgment or, in the Alternative, for Remittitur

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW Texaco Refining & Marketing Inc. and Texaco Marine Services Inc., Defendants herein, and respectfully submit the following supplemental memorandum of law specifically concerning the imposition of prejudgment interest.

A party claiming a maritime cause of action, as the Defendants do herein insofar as the movants are concerned, may elect to bring an action at law pursuant to 28 U.S.C. § 1333, commonly known as the savings to suitors clause. It is for this reason that such an action may be prosecuted in a state court inasmuch as the federal courts have exclusive jurisdiction over causes of action brought in admiralty. 28 U.S.C. § 1333(1).

A recognized advantage to proceeding in admiralty rather than at law is the discretion of the Court to award prejudgment interest in those cases. *Pickle v. International*

Oilfield Divers, Inc., 791 F.2d 1237 (5th Cir. 1986). On the opposite hand, if the claimant elects a state forum for adjudication, he trades off his right to prejudgment interest for the choice of court just as he trades his right to interest for a right to jury. *Snyder v. Whittaker Corporation*, 839 F.2d 1085 (5th Cir. 1988); *Martin v. Walk, Haydel & Associates, Inc.*, 794 F.2d 209 (5th Cir. 1986). This principle was confirmed recently in *Monessen Southwestern Railway Co. v. Morgan*, 108 S.Ct. 1837 (1988). Therein, the Plaintiff claimed, as the Plaintiffs will undoubtedly do herein, that state law provided an entitlement to prejudgment interest. The Court, in this FELA action, explicitly rejected this, holding that the proper measure of damages must be determined by federal law. Herein, the Plaintiffs stand in the same position as they would in federal court had they brought suit on the law side vice admiralty side of the federal court. In that situation, they would not be entitled to an award of prejudgment interest and thus they are not so entitled herein, Texas law notwithstanding.

Respectfully submitted,

CLANN, BELL & MURPHY

/s/ MICHAEL C. FARROW
Michael C. Farrow
TBA #060847750
Twentieth Floor
1300 Post Oak Boulevard
Houston, Texas 77056
(713) 871-0333
ATTORNEYS FOR
DEFENDANTS
TEXACO MARINE
SERVICE INC. AND
TEXACO REFINING &
MARKETING INC.

Certificate of Service

I hereby certify that a true and correct copy of the Defendants' Supplemental Memorandum in Support of Their Motion for New Trial or, in the Alternative, to Modify, Correct or Reform the Judgment or, in the Alternative, for Remittitur was sent by Federal Express ot Jon B. Burmeister, Moore, Landrey, Garth & Jones, Liberty-Pearl Complex, 285 Liberty, Suite 1900, Beaumont, Texas 77701; and Steven C. Barkley, Evans, Moses & Barkley, 815 Goodhue Building, Beaumont, Texas 77701; on this 6th day of December, 1988.

/s/ MICHAEL C. FARROW
Michael C. Farrow

APPENDIX K

NO. B-127,026

IN THE DISTRICT COURT OF
JEFFERSON COUNTY, TEXAS
60TH JUDICIAL DISTRICT

ESTATE OF DAU VAN TRAN, ET AL.

vs.

TEXACO REFINING & MARKETING, INC., ET AL.

MOTION TO AMEND FINDINGS OF FACT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Plaintiffs, and file this their Motion to have the Court amend its Finding of Fact #50 and Finding of Fact #51, and would show unto the Court the following:

I.

In Finding of Fact #50 and Finding of Fact #51, the Court awarded a certain sum of money representing mental anguish for both the mother and father of the decedent. Based upon one of the points mentioned in the Motion for New Trial filed by the TEXACO Defendants, said Defendants allege that under general maritime law, the Court may not award damages for mental anguish. In that event, the Plaintiffs would respectfully request that the Court reconsider its award for loss of companionship, affection and society, both past and future, for both the mother and father.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray that their Motion to Amend Findings of Fact be granted, and for such other and further relief to which they may show themselves justly entitled to receive.

Respectfully submitted,

MOORE, LANDREY, GARTH
& JONES
Liberty-Pearl Complex
285 Liberty, Suite 1900
Beaumont, TX 77701
(409) 835-3891

By /s/ JON B. BURMEISTER
Jon B. Burmeister, of Counsel
TBA #03425500

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing instrument has been mailed certified, return receipt requested, to Mr. Michael C. Farrow, CLANN, BELL & MURPHY, 1300 Post Oak Blvd., 20th Floor, Houston, TX 77056, and to Mr. Steven C. Barkley, EVANS, MOSES & BARKLEY, 815 Goodhue Bldg., Beaumont, TX 77701, on this the 8th day of November, 1988.

/s/ JON B. BURMEISTER
Jon B. Burmeister